No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FIRST RESORT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Across the country, disagreements over abortion have prompted a variety of speech restrictions targeting particular speakers because of their views on abortion. The resulting court decisions have distorted important First Amendment doctrines, particularly in the areas of neutrality analysis, commercial speech, and professional speech. This case provides an important opportunity for the Court to either fully correct these doctrinal distortions or to lay the groundwork to provide a full correction in a subsequent case. The particular law at issue here targets pro-life speakers and requires them to refer women to government programs that will provide abortions, but the Ninth Circuit failed to apply strict scrutiny. The questions presented are:

Whether a content- and viewpoint-based law may avoid strict scrutiny based on judicial guesswork as to a speaker's presumed purpose in engaging in the regulated speech.

Whether this Court's commercial speech doctrine, and references to "professional speech," can be applied to the speech of non-profit pregnancy counselors who provide free and often religiously-motivated assistance to pregnant women.

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INTEREST OF THE AMICUS[1]

First Resort, Inc., is a California non-profit corporation that operates a pregnancy services counseling clinic in San Francisco. First Resort believes that abortion is harmful both to women and their unborn children, and its vision is to build a Bay Area in which abortion is neither desired nor seen as needed. In support of that vision, First Resort does not provide or refer for abortions, but instead empowers women to make fully-informed decisions in line with their own beliefs and values, on the belief that, when given appropriate support, unbiased counseling, and accurate medical information, many women will choose options other than abortion. All of First Resort's services are provided free of charge.

First Resort is concerned that in the vigorous and vital national debate about abortion, numerous state and local governments have impermissibly targeted the speech of counseling organizations like First Resort. The Fourth Circuit recently referred to the ways in which this "[w]eaponizing [of] the means of government against ideological foes"—which can happen from either side in this or any debate—poses "grave" risks to "one of our nation's dearest principles." *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, __ F.3d ____, 2018 WL 298142, at *8 (4th Cir. Jan. 5, 2018) (*Greater Baltimore III*) (Wilkinson, J.).

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Counsel for all parties have consented to the filing of this brief.

One of those grave risks is the distortion of important First Amendment doctrines by lower courts upholding such laws. First Resort's own case is a prime example. There, the Ninth Circuit upheld a San Francisco law targeting advertising by "anti-abortion" pregnancy counselors as viewpoint neutral because speakers *might* engage in pro-life speech "for reasons that have nothing to do with their views on abortion, such as financial or logistical reasons." *First Resort, Inc.* v. *Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017). And it found that the speech of non-profit pregnancy centers that provide free assistance was actually "classic" commercial speech because free assistance is "commercially valuable," and because the non-profits engage in "fundraising" elsewhere. *Id.* at 1273-74.[2]

First Resort therefore submits this amicus brief to ensure that the Court is aware of the full scope of the distortions of First Amendment doctrine that have arisen in the lower court cases concerning pregnancy centers. This case is an important opportunity either to correct those distortions or to lay the groundwork to do so in a subsequent case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment's protections for minority speakers are most needed—and most in jeopardy—when speech relates to deeply important and deeply controversial issues. When the speech matters most,

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[2] Amicus expects to file a petition for certiorari by February 1, 2018. See Order of Kennedy, J., Granting Application for Extension of Time to File for Writ of Certiorari, *First Resort, Inc.* v. *Herrera*, No. 17A600 (U.S. Dec. 5, 2017).

the temptation toward government control is greatest. This is true both for the political branches the First Amendment is designed to restrain and, perhaps more dangerously, for the judges charged with its enforcement.

California's FACT Act is part of a range of speech regulations enacted in various jurisdictions to target pregnancy counselors who will not recommend abortions. Had the lower courts properly applied the First Amendment, these should have been easy cases. Unfortunately, many courts instead twisted important First Amendment doctrines to uphold these laws. As a result, important doctrines relating to content-neutrality, viewpoint-neutrality, and commercial speech have been badly warped in a growing body of appellate decisions. Left in place, these decisions pose a serious threat to the First Amendment's power to restrain governments that would otherwise wish to control minority speech.

This case presents the Court with an important opportunity to correct, or at least begin to correct, some of those doctrinal distortions. Some of these errors are on full display in this case, including questions about how to determine whether a law is content- and viewpoint-based. The Court should resolve these questions here, and thus provide much needed doctrinal correction. Other errors—chiefly related to the definition of commercial speech and whether that definition can be stretched to include non-profit speakers who neither offer nor engage in commercial transactions with their audience—received less attention from the panel below, but can either be resolved in this case or in a subsequent case in which the issue has been more thoroughly explored.

The freedom to differ depends upon the fair and faithful application of First Amendment doctrines that exist to constrain the government temptation toward speech control. That fair and faithful application has at times been absent in the lower court pregnancy center cases, creating precedents that, if left uncorrected, will result in diminished protection for speakers on a wide variety of issues. This Court has an important opportunity to at least begin correcting these doctrinal distortions and ensuring that the First Amendment continues to protect all speakers, including those who may disagree with their governments on important issues.

ARGUMENT

I. This case presents an important opportunity to correct doctrinal distortions concerning content- and viewpoint-neutrality analysis.

This case is best understood as part of a larger group of cases in which governments have deliberately targeted speakers for special burdens based on either their willingness to, or their refusal to, refer for abortions. This "[w]eaponizing [of] the means of government against ideological foes," *Greater Baltimore III*, 2018 WL 298142, at *8, has led some lower courts to distort the content- and viewpoint-neutrality analysis required by the First Amendment.

A. The FACT Act is one of many laws targeting speech by pro-life pregnancy counselors.

The FACT Act is one of many restrictions on the speech of "pregnancy service centers" that have been

enacted "around the country." *First Resort*, 860 F.3d at 1268. Although these restrictions share the same unconstitutional goal—targeting pro-life pregnancy centers' speech for special disfavor—they pursue that goal in different ways. By Amicus's count, eleven state and local governments have enacted pregnancy-center speech regulations; each of these laws is reproduced in the Appendix attached to this brief, and their relevant provisions are summarized below.[3]

The laws differ first in the nature of the burden they impose. Most pregnancy-center speech regulations—the FACT Act, plus the laws passed in Austin, Baltimore, Hartford, Hawai'i, Illinois, King County, Montgomery County, and New York City—impose burdens in the form of compelled speech: they force pro-life pregnancy centers to disseminate a government-composed message, either in their waiting rooms or otherwise.[4] Sometimes (as under the FACT Act, in Hawai'i, and in Illinois) the compelled message

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[3] Some governments have enacted speech regulations that target pro-abortion centers. See, *e.g.*, Fla. Stat. § 390.025 (1)-(3) (2017) (requiring only those pregnancy counselors that "provide[ ] advice or help * * * in obtaining abortions" to, among other things, register with the government and provide an explanation of abortion alternatives before referring women to abortion providers).

[4] Appendix ("App.") 2a; 4a-5a; 11a-13a; 21a-22a; 28a-29a; 37a-38a; 46a-47a; 51a-52a; 58a-61a.

is effectively an outright abortion referral.[5] Under other laws (Austin, Baltimore, Hartford, King County, Montgomery County, New York), the message is a disclaimer about the scope of the pregnancy center's services—a message that deprives pregnancy centers of the right to truthfully describe their services in their own words.[6]

Other governments—like San Francisco and Oakland—have instead taken the tack of passing pregnancy-center-specific false-advertising laws that prohibit centers that do not provide or refer for abortions (but not those that do) from making "untrue or misleading statements concerning their services."[7] San Francisco has interpreted its law to be violated if, for instance, a pregnancy center does not provide an express disclaimer about abortions in its advertising to women looking for information online about abortion—stretching the idea of falsity far beyond the breaking point and effectively outlawing local pregnancy centers from attempting to reach the very women they exist to serve.

Second, these laws differ in how they go about targeting pro-life pregnancy centers. Many of these regulations (including in Baltimore, Illinois, Oakland, and

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[5] *Id.* 12a; 28a; 37a-38a.

[6] *Id.* 2a; 4a; 21a; 46a; 51a; 58a-60a.

[7] *Id.* 82a-83a; see also *id.* 72a.

San Francisco) directly target pro-life pregnancy centers by providing on their face that they apply *only* to pregnancy centers that do not provide or refer for abortions.[8] The FACT Act, however, zeroes in on pro-life pregnancy centers by way of broad *exemptions* from coverage. The Act provides a mechanism for exempting from coverage for pregnancy centers that can agree to supply all FDA-approved contraceptive methods and supplies—a category that includes abortifacients and thus excludes pro-life centers.[9]

The following chart summarizes the relevant provisions of these laws.

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[8] *Id.* 4a; 70a; 81a; see also *id.* 37a-38a (applying only to service providers who have "conscience-based objections" to certain procedures, including abortion).

[9] *Id.* 11a (exempting centers that are enrolled in the California Family PACT program); see also Pet'rs' Br. at 13-14 (explaining that such centers must provide abortifacients).

Gov't	Compelled speech	False advertising	Application expressly depends on whether speaker refers for abortion
Austin	✓		✓
Baltimore	✓		✓
California	✓		
Hartford	✓	✓	
Hawai'i	✓		✓
Illinois	✓		✓
King Co., WA	✓		
Mont'y Co., MD	✓		
New York City	✓		
Oakland		✓	✓
San Francisco		✓	✓

B. The Court can provide an important correction to First Amendment neutrality doctrine.

Two doctrinal distortions related to neutrality testing have arisen in the pregnancy center cases. First, some courts have suggested that a law can be neutral despite a governmental purpose to discriminate. Second, some courts have suggested that an otherwise content- or viewpoint-based law might nevertheless be deemed neutral, depending on the *speaker's* purpose in engaging in speech.

Both errors are on full display in the decision below. There, the panel found the law content-based, but declined to apply strict scrutiny. Pet. App. 18a-19a. Further, although the Act was carefully designed to apply only to pregnancy centers that do not provide or refer for abortions—and although the legislature's express purpose was to target speakers who "discourage" abortion—the court speculated about speaker motivations to find the law neutral. *Id.* 7a, 20a, 40a.

The Ninth Circuit erred on both counts. "Content-based laws" like the Act "are presumptively unconstitutional and may be justified only if the government proves that they" satisfy strict scrutiny. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Further, even a facially-neutral law is considered viewpoint-based if its "justification or purpose" is to target a particular viewpoint. *Id.* at 2226-29; see also *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 564-65 (2011) (applying heightened scrutiny because the "legislature designed" the law at issue "to target [certain] speakers and their messages for disfavored treatment"). That plainly is the case here: the Act exempts from coverage

pregnancy centers that provide or refer for abortion, and the legislative history confirms that its purpose was to target pregnancy centers that advocate against abortion.

The Ninth Circuit's errors are independent, but they stem from a common source: confusion about to what extent *purpose* matters in Speech Clause jurisprudence, and if it does, *whose*. The court ignored the legislature's purpose to target centers that "discourage * * * women from seeking abortions." Pet. App. 7a. While ignoring the *government's* purpose, the panel based its neutrality finding on guesswork about the *speaker's* purpose. *Id.* 20a (neutral because some speakers may refuse to refer without having "objections" to abortion).

This reasoning gets this Court's cases precisely backward. One object of this Court's Free Speech doctrines is "the discovery of improper governmental motives." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996). Meanwhile, "[u]nder well-accepted First Amendment doctrine, a *speaker's* motivation is entirely irrelevant to the question of constitutional protection." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J., joined by Alito, J.) (emphasis added) (quoting M. Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 91 (2001)); see also *id.* at 492 (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) ("test[s] that [are] tied to * * * a court's perception" of the speaker's "intent" are "ineffective to vindicate * * * fundamental First Amendment rights"); *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017)

(Kennedy, J., concurring, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (rejecting the argument that a law was viewpoint-neutral because it applied "regardless of the [speaker]'s personal views or reasons for" engaging in the speech). The Ninth Circuit's ruling to the contrary was both wrong and part of a dangerous trend.

1. Content- and viewpoint-discriminatory laws, including those enacted for the purpose of discriminating on the basis of content or viewpoint, are subject to strict scrutiny.

Before *Reed*, many lower courts—including the Ninth Circuit—had held that a governmental motive to censor particular subject matter or a particular viewpoint was the *sine qua non* of content- or viewpoint discrimination. For these courts, "it did not matter if a law regulated speakers based on what they said"; "so long as the regulation of speech was not imposed *because of* government disagreement with the message," the law would be treated as content- and viewpoint-neutral. *Norton* v. *City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring); see also *McCullen* v. *Coakley*, 571 F.3d 167, 176 (1st Cir. 2009) ("Our principal inquiry in this regard * * * 'is whether the government has adopted a regulation of speech because of disagreement with the message'") (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)).

In *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014), however, this Court affirmed what should have been obvious all along: that a speech regulation could *also*

be content- or viewpoint-based if its application depended on the content or viewpoint of the regulated speech, even absent a discriminatory purpose. A content-based law, the Court explained, "draw[s] content-based distinctions on its face." *Id.* at 2531. And a law violates this test if "it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* (internal quotation marks omitted).

Reed then confirmed *McCullen*'s reorientation of the content-neutrality inquiry to begin with the actual text of the law. Reiterating *McCullen*, this Court explained in *Reed* that "the crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face"—that is, whether it "draws distinctions based on the message a speaker conveys." 135 S. Ct. at 2227. At the same time, however, the *Reed* Court made clear that the inquiry into facial neutrality *supplements*, but does not *replace*, the inquiry into whether a law has a content- or viewpoint-discriminatory purpose. In other words, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). But if a law *is* motivated by an "illicit legislative intent"—for example, "to suppress disfavored speech" or express "disagreement with the message the [regulated] speech conveys"—then it, too, is subject to strict scrutiny, even if it is facially content- and viewpoint-neutral. *Id.* at 2227-29 (internal quotation marks omitted). Intent to suppress

speech is thus a sufficient but not necessary element of a content or viewpoint discrimination claim.

This Court's earlier decision in *Sorrell* illustrates *Reed*'s point. In *Sorrell*, the Court applied heightened scrutiny for two reasons: facial discrimination and discriminatory purpose. 564 U.S. at 563-65. The law at issue prohibited "the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors"—activities that "essentially * * * only" pharmaceutical manufacturers engaged in. *Id.* at 557, 564 (internal quotation marks omitted). The Court thus found that the inevitable effect of the law was to burden the pro-brand-name-drug viewpoint. *Id.* at 564-65. Further, "formal legislative findings" demonstrated that the legislature had "designed [the law] to target [pharmaceutical manufacturers] and their messages for disfavored treatment." *Id.* This combination of the law's "practical operation" and express legislative purpose rendered the law viewpoint-based, regardless of whether it was also facially viewpoint-based. *Id.* at 565 (quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 391 (1992)).

Finally, in *Matal*, this Court confirmed that while the *government*'s purpose may be relevant, the *speaker*'s purpose for speaking is not. In *Matal*, this Court held unconstitutional a federal statute prohibiting the registration of "disparag[ing]" trademarks. 137 S. Ct. at 1751. The government argued that the law was viewpoint-neutral because "the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark." *Id.* at 1766. But the Court unanimously rejected this argument and found the law viewpoint-based. *Id.* at

1763 (opinion of Alito, J.); 1765-67 (opinion of Kennedy, J.). As Justice Kennedy explained for four Justices, "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Id.* at 1767. This danger is realized whenever the government "single[s] out * * * for disfavor" a "subset of messages" from some larger "subject category"—regardless of *why* the speaker chooses to deliver the message. *Id.* at 1766 (citing *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

2. The Act should be subject to strict scrutiny.

The Act is content- and viewpoint-discriminatory, thus triggering strict scrutiny, for two independent reasons.

First, the Act is a content-based regulation of core protected speech. Pet. App. 18a. Under *Reed*, such a law automatically triggers strict scrutiny. 135 S. Ct. at 2227.

Second, the Act is viewpoint-based, because its manifest purpose and effect is to discriminate against speech by pro-life pregnancy centers. The express legislative purpose of the Act is to target pregnancy centers that "discourage * * * women from seeking abortions." Pet. App. 6a-7a. Unsurprisingly, then, the Act exempts from its coverage all pregnancy centers that are enrolled in state programs and supply all FDA-approved contraceptive methods and supplies—a category that includes abortifacients. App. 11a (exempting centers that are enrolled in the California Family PACT program); Pet'rs' Br. at 13-14, 33. Thus, the "inevitable effect" and "practical operation" of the law is

to burden the speech only of pro-life pregnancy centers. *Sorrell*, 564 U.S. at 565 (internal quotation marks omitted).

The Ninth Circuit nonetheless found the law viewpoint-neutral, Pet. App. 19a-22a, because it wrongly focused on the *speaker*'s purpose for speaking rather than the government's purpose for regulating. The court refused to engage with Petitioners' argument that the Act's exemptions rendered pro-life pregnancy centers virtually the only speakers subject to the Act, because, according to the court, the Act is "indifferent to the basis for any objection" that pregnancy centers who do not provide or refer for abortions may have to abortion. *Id.* 40a; see also *id.* 20a (the Act "applies * * * regardless of what, if any, objections [regulated centers] may have to certain family-planning services"). But what matters under this Court's viewpoint-discrimination precedents is simply whether a law singles out one position within a broader subject matter; it is irrelevant if speakers may have different "views or reasons for" speaking with that viewpoint. *Matal*, 137 U.S. at 1766; see also *Air Line Pilots Ass'n, Int'l* v. *Dep't of Aviation of Chi.*, 45 F.3d 1144, 1169 (7th Cir. 1995) ("[T]he same viewpoint can be endorsed by different speakers, for different purposes. Any analysis of allegations of viewpoint discrimination must recognize as much.").

Here, within the larger category of pregnancy centers that speak about abortion, the Act singled out for disfavored treatment centers that refuse to recommend it. It no more matters *why* the regulated centers took this position than it mattered why the Slants chose their band name in *Matal*—or, for that matter,

than it would matter in a challenge to a law prohibiting yard signs for Democratic (but not Republican) candidates if it turned out that the plaintiff wanted to display the sign in jest or only because he had lost a bet. Regardless of the plaintiff's motivations, such a law would patently be viewpoint-based.

3. The Ninth Circuit's errors with respect to content and viewpoint discrimination are reflected in other pregnancy-center cases, too.

The Ninth Circuit's errors reflect widespread confusion in the lower courts regarding the application of this Court's modern Speech Clause jurisprudence to various pregnancy center speech regulations that have been enacted around the country.

For instance, in *First Resort*, the same Ninth Circuit panel that decided *NIFLA* considered a San Francisco ordinance that prohibits pregnancy centers that do not provide or refer for abortions from making "untrue or misleading" statements "concerning th[eir] services." 860 F.3d at 1270 (quoting S.F. Admin. Code, ch. 93 § 93.4). The *First Resort* court did not dispute that the ordinance was content-based, *id.* at 1275-76—nor could it, as the ordinance by its terms applies only to advertisements that "concern" the services of a pregnancy center and are made by pregnancy centers that do not provide or refer for abortion or emergency contraceptives. The ordinance is thus "content based [because] it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." See *McCullen*, 134 S. Ct. at 2531 (internal quotation marks omitted). Nonetheless, the Ninth Circuit declined to apply

strict scrutiny because, in its view, the ordinance applied only to "false or misleading commercial speech," which is outside the protection of the First Amendment. *First Resort*, 860 F.3d at 1271-74.

As explained below, the *First Resort* court erred in determining that the regulated speech was "commercial." See Part II, *infra*. But even if the speech *were* commercial, that still would not save it from strict scrutiny.

Even in the context of commercial speech, *viewpoint* discrimination is still forbidden. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 513 (1996) ("It is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance[.]"); see also *Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring) (explaining that commercial speech regulations discriminating based on viewpoint are egregious forms of content-based restrictions that are almost per se unconstitutional); *Wandering Dago, Inc.* v. *Destito*, __ F.3d ____, 2018 WL 265383, at *14 (2d Cir. Jan. 3, 2018) ("*Matal* instructs that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context.").[10]

In finding the law viewpoint-neutral, the *First Resort* court refused to consider the government's purpose. *First Resort*, 860 F.3d at 1278 ("To the extent

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[10] The panel was wrong to think such discrimination irrelevant simply because the government claimed to be regulating "false and misleading commercial speech." Under *R.A.V.*, the government is barred from discriminating within even categories of speech that are otherwise considered outside the First Amendment. 505 U.S. at 383.

First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive, that argument also fails." (citing *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968)). Instead, it focused on the speaker's purpose, holding that speakers could have different *reasons* for not providing or referring for abortions, which might "have nothing to do with their views on abortion." *Id.* at 1277 (citing *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 721 F.3d 264, 288 (4th Cir. 2013) (*Greater Baltimore II*) (en banc)).

This holding that speaker purpose controls, and that governmental purpose is irrelevant, is rich with irony; again, before *Reed*, the Ninth Circuit had held that *only* a discriminatory governmental purpose could trigger strict scrutiny. *Reed* v. *Town of Gilbert*, 707 F.3d 1057, 1071-72 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218 (2015). Further, to hold that the government's purpose for regulating *doesn't* matter while the speaker's purpose for speaking *does* is, again, to turn this Court's cases on their head. Under *Reed* and *Sorrell*, the government's purpose for regulating may be relevant to determining if a law discriminates on the basis of content or viewpoint. But in determining whether a law discriminates on the basis of viewpoint, the *speaker's* purpose for speaking is *not* relevant: a law that singles out one particular viewpoint for special burdens impermissibly "distort[s] the marketplace of ideas," even if different speakers might have

different "personal views or reasons for" adopting the viewpoint. *Matal*, 137 S. Ct. at 1766 (Kennedy, J.).[11]

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[11] Outside of pregnancy-center cases, most courts have correctly recognized that under *Reed* a law is subject to strict scrutiny if it *either* is content- or viewpoint-discriminatory on its face *or* it was passed for the purpose of discriminating on the basis of content or viewpoint. See, *e.g.*, *March* v. *Mills*, 867 F.3d 46, 54 (1st Cir. 2017) *pet. for cert. filed*, Nov. 9, 2017 (No. 17-689) (under *Reed*, "[t]here are two distinct ways in which a regulation may be deemed to be content based," facial content discrimination, and a content-discriminatory purpose); *Time Warner Cable Inc.* v. *F.C.C.*, 729 F.3d 137, 155 (2d Cir. 2013) (same) *Free Speech Coal., Inc.* v. *Att'y Gen. U.S.*, 825 F.3d 149, 160 (3d Cir. 2016) (same); *Cahaly* v. *Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (same) *Pursuing Am.'s Greatness* v. *Fed. Election Comm'n*, 831 F.3d 500, 509 (D.C. Cir. 2016) (same).

But in *Phelps-Roper* v. *City of Manchester*, 867 F.3d 883 (8th Cir. 2017), the Eighth Circuit, echoing the Ninth Circuit in *NIFLA* and *First Resort*, held that "[r]egardless of any evidence" that the legislature had a viewpoint-discriminatory purpose in passing the law at issue, the law was "neutral on its face" and thus not viewpoint discriminatory. *Id.* at 892. This split of authority regarding whether *Reed* recognizes two paths to strict scrutiny (facial discrimination or a discriminatory purpose) or just one (facial discrimination only) is another reason for this Court to either clearly reiterate that a law passed with a viewpoint-discriminatory purpose is subject to strict scrutiny or else agree to hear another case cleanly presenting the issue.

The Ninth Circuit is not alone in this error. In another pregnancy center case, the en banc Fourth Circuit considered a regulation requiring pro-life pregnancy centers to post "disclaimer[s]" in their waiting rooms stating that they "do[ ] not provide or make referral for abortion or birth-control services," *Greater Baltimore II*, 721 F.3d at 271 (quoting Baltimore ordinance at issue). Even though the law applied only to pregnancy centers that do not provide or refer for abortions, the en banc court reversed the district court's conclusion that the law was viewpoint-based, relying on the court's own speculation about speaker purposes. In particular, the court thought there *might* be pregnancy centers who do not refer for abortion but have "no moral or religious qualms" about abortion. 721 F.3d at 288 (internal quotation marks omitted). The court cited no authority for its proposition that the viewpoint-neutrality inquiry requires the court to determine whether a speaker has a moral or religious *motive* for expressing a particular viewpoint. See *id.* Yet this unsupported statement from *Greater Baltimore II* became the sole basis for the *First Resort* court to arrive at the same proposition four years later. *First Resort*, 860 F.3d at 1277.[12]

In contrast to this case, *First Resort*, and *Greater Baltimore II*, the district court in *Centro Tepeyac* appropriately applied strict scrutiny upon determining

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[12] After years of discovery confirmed that the *Greater Baltimore* pregnancy center's "clearest motivation" was indeed "moral, philosophical, and religious," the Fourth Circuit ultimately recognized that the law at issue there discriminated on the basis of viewpoint. *Greater Baltimore III*, 2018 WL 298142, at *4, 6.

that a pregnancy center speech regulation was content-based. There, the court explained that because the regulation at issue "require[d] [pregnancy centers] to say something [they] might not otherwise say," it was content-based and triggered strict scrutiny. *Centro Tepeyac* v. *Montgomery County*, 779 F. Supp. 2d 456, 462 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc). The court correctly found it "unnecessary to address" the pregnancy center's additional contention that the regulation also was viewpoint-based, because content-based laws trigger strict scrutiny. 779 F. Supp. 2d at 461-62.

Finally, other district courts have had no trouble concluding that a speech regulation whose applicability turns on whether a speaker provides or refers for abortions discriminates not just based on content, but also on viewpoint. In *National Institute of Family & Life Advocates* v. *Rauner*, the court considered an Illinois law that compelled pregnancy centers with "conscience-based objections" to abortion to either "inform their patients about abortion and counsel them on [its] risks and benefits" or lose the protection of a state law protecting healthcare providers from having to provide abortions directly. Order, *National Institute of Family & Life Advocates* v. *Rauner*, No. 16 C 50310, ECF 65, at 2, 7 (N.D. Ill. July 19, 2017). The court held that the law was both content- and viewpoint-based. *Id.* at 6-8.

Meanwhile, in *Fulwilder* v. *Senior*, the Northern District of Florida considered the converse of the laws at issue in the pregnancy-center cases discussed above: a law that compelled speech by and required a license for only organizations that *do* refer for abortions. Prelim. Injunction, *Fulwilder* v. *Senior*, No.

4:16-cv-00765, ECF 43, at 2 (N.D. Fla. Sept. 29, 2017) (citing Fla. Stat. § 390.025). The court held that because the law "requir[ed] a person to register and pay a fee when providing advice or help in favor of abortion but not in opposition," the law was "plainly viewpoint-based." *Id.* at 20; see also *id.* at 21 (law was a "naked effort to impede speech * * * promoting a disfavored but legal viewpoint"). Precisely the same reasoning should apply to laws, like the FACT Act and the others described above, that impose burdensome speech regulations on persons when providing advice or help in *opposition* to abortion but not *in favor* of it.

* * *

This Court should craft its disposition in this case so as to resolve the confusion about how *Reed*, *Sorrell*, and *Matal* apply to the various pregnancy center speech regulations that have been enacted around the country. When a speech regulation regulates core protected speech on the basis of content or viewpoint, it is subject to strict scrutiny. In determining whether a law regulates on the basis of viewpoint, the government's purpose for regulating is relevant, but the speaker's purpose for speaking is not. These rules—fundamental to ensuring that the government does not impermissibly put a thumb on the scale in the hotly contested and deeply important societal debate over abortion—should apply to abortion-related speech just as they do to any other type of speech.

II. This case presents an important opportunity to clarify that the "commercial" and "professional" speech categories cannot be used to shield ideological speech restrictions from strict scrutiny.

In the lower court, Respondents attempted to avoid the ineluctable result of the Act's content- and viewpoint-based discrimination—strict scrutiny—by claiming that the Act regulates only "professional" and "commercial" speech subject to lower tiers of constitutional protection. The Ninth Circuit summarily rejected the commercial speech argument, reasoning in a footnote that while "[c]ommercial speech does no more than propose a commercial transaction," the Act "primarily regulates the speech that occurs within the clinic," where pregnancy centers propose no commercial transactions but rather provide their counseling services on a pro bono basis. Pet. App. 18a-19a n.5 (internal quotation marks omitted). But the court accepted the professional speech argument as to the Act's Licensed Notice, holding that because that notice applies only to licensed pregnancy centers, all the speech regulated under that provision of the Act "occurs between professionals and their clients in the context of their professional relationship" and can accordingly be regulated subject only to intermediate scrutiny. *Id.* 28a-33a.

The court was right about commercial speech and wrong about professional speech, largely for the same reason: neither doctrine applies to morally and religiously-motivated counseling services offered for free. Regarding professional speech, this Court has "never formally endorsed the professional speech doctrine" in

the first place. *Serafine* v. *Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). But this Court has rejected arguments to subject pro bono speech offered by a licensed professional to a lower tier of constitutional scrutiny. *In re Primus*, 436 U.S. 412 (1978); *NAACP* v. *Button*, 371 U.S. 415 (1963).

As for commercial speech, the very reason the doctrine exists is that this Court has presumed that speech in which the speaker offers to sell something to the listener is "more durable than other kinds" of speech. *Virginia State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). And the Court's cases have closely tracked this rationale. "*[T]he test*" for whether speech is commercial, this Court has explained, is whether it is a "proposal of a commercial transaction," *Discovery Network*, 507 U.S. at 423 (quoting *Bd. of Trustees of State Univ. of New York* v. *Fox*, 492 U.S. 469, 473-74 (1989)) (emphasis in *Discovery Network*). This test plainly is not satisfied when the speaker doesn't sell anything at all.

Nonetheless, courts around the country have struggled to apply this Court's commercial speech precedents to the principles-driven, nonpecuniary speech engaged in by pro-life pregnancy centers. Two courts—the Ninth Circuit in *First Resort* and the en banc Fourth Circuit in *Greater Baltimore II*—have dispensed with the requirement that commercial speech "propose a commercial transaction," instead suggesting that if a pregnancy center offers commercially valuable services, or if it could at some point have greater success in raising funds for its mission by virtue of the success of its counseling services, its speech may be treated as commercial. *First Resort*, 860 F.3d at 1271-

74; *Greater Baltimore II*, 721 F.3d at 284-87.[13] This novel approach replaces this Court's "propose a commercial transaction" test with an amorphous multi-factor test under which no one element is either necessary or sufficient. *First Resort*, 860 F.3d at 1273-74; *Greater Baltimore II*, 721 F.3d at 285-86. It ignores that "the solicitation of charitable contributions is" *itself* "protected speech." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988). And it also effects a sweeping expansion of the commercial speech doctrine, subjecting a vast swath of speech by ideologically-oriented nonprofit organizations to lower levels of constitutional protection, and higher levels of government control.

In addition to addressing professional speech, then, this Court could use this case as an opportunity to resolve the distortions in the commercial speech doctrine that have arisen in the lower courts' pregnancy-center cases. Alternatively, if the Court does not address the commercial speech doctrine here, it should agree to hear another pregnancy-center case presenting the issue more fully, such as *First Resort*.

A. Under this Court's cases, pro-life advocacy by pregnancy centers is not commercial speech.

This Court has held that speech regulations may sometimes be subject to lower tiers of constitutional

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[13] After several years of additional discovery, the trial court found, and a Fourth Circuit panel recently affirmed, that the particular pregnancy center at issue in *Greater Baltimore* was *not* engaged in commercial speech. *Greater Baltimore III*, 2018 WL 298142, at *3-4.

scrutiny if the speech regulated can be characterized as "commercial." See *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). But this doctrine cannot apply to the moral and religious advocacy at issue in this and other pregnancy-center cases. Indeed, this Court has long accepted that religious groups can solicit funds or even invite purchases without their speech becoming "commercial." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943) (speech was not commercial "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes"). Otherwise, "the passing of the collection plate in church would make the church service a commercial project." *Id.*

Between pregnancy centers and the women who come to them for help, there is not even a passing of the plate. And this Court has never held that speech by entities who provide all their services for free and in furtherance of a moral or religious mission can be regulated as "commercial."

This Court has explained the "commonsense differences" between commercial speech and other speech, providing "a different degree of protection" to commercial speech because "commercial speech may be more durable than other kinds." *Va. State Bd.*, 425 U.S. at 771 n.24. "Since advertising is the [s]*ine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Id.* This logic, centered on the power of profits to make speech more durable, plainly dissolves when the speaker merely wants to render her listener free services.

No wonder, then, that since *Virginia State Board*, this Court has repeatedly held that "*the test*" for commercial speech is whether it is a "proposal of a commercial transaction." *Discovery Network*, 507 U.S. at 429 (quoting *Fox*, 492 U.S. at 473-74). And it has articulated the archetypical example of such speech as "I will sell you the X [product] at the Y price." *Va. State Bd.*, 425 U.S. at 761. This type of speech—speech that proposes a commercial transaction and thus relates "to the economic interests of [both] the speaker and its audience," *Cent. Hudson*, 447 U.S. at 561—is a minimum requirement for speech to be characterized as "commercial" for purposes of the commercial speech doctrine.

Contrary to the assertion of some courts in pregnancy-center cases discussed below, this Court did not waver from this principle in *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). There, the Court considered whether informational pamphlets that did not *just* propose a commercial transaction but also "contain[ed] discussions of important public issues" could be characterized as commercial. *Id.* at 67-68. The Court held that when evaluating speech that "cannot be characterized *merely* as proposals to engage in commercial transactions," courts should look to three factors to determine whether the speech as a whole should be treated as commercial: whether the speech constitutes an "advertisement[]"; whether it "reference[s] a specific product"; and whether the speaker "has an economic motivation for" speaking. *Id.* at 66-67 (emphasis added). In other words, under *Bolger*, the mere addition of noncommercial elements cannot transform otherwise commercial proposals into non-

commercial speech; courts must apply the *Bolger* factors to determine whether speech mixing the two should be treated as ultimately "commercial" or not. *Id.*; cf. *Murdock*, 319 U.S. at 111 (appending "moral platitudes" not enough). But nothing in *Bolger* dispenses with the bedrock requirement that for speech to be considered commercial, the speaker must propose a commercial transaction in the first place. And indeed, since *Bolger*, this Court has repeatedly reaffirmed in no uncertain terms that "the difference between commercial and noncommercial speech" is that commercial speech is "define[d]" as "speech that proposes a commercial transaction." *Fox*, 492 U.S. at 482; *Discovery Network*, 507 U.S. at 423.

Here, under this Court's longstanding test, the Ninth Circuit was correct to conclude that the speech by licensed pregnancy clinics who provide all of their services for free is not "commercial." Pet. App. 18a-19a n.5. Observing that commercial speech "propose[s] a commercial transaction," the Ninth Circuit easily disposed, in a footnote, of California's claim that the clinic speech was commercial. *Id.* There are obviously no commercial transactions being proposed in a clinic that offers its services for free.

B. The Ninth Circuit's "professional speech" holding is in clear conflict with this Court's cases.

Although the so-called "professional speech" doctrine has different origins than the commercial speech doctrine, it, too, is rooted in the notion that a speaker's interest in obtaining money from a listener can potentially justify higher levels of regulation. Lower courts have traced the doctrine back to a concurring opinion

in *Thomas* v. *Collins*, 323 U.S. 516 (1945), in which Justice Jackson articulated the justification for professional-licensing schemes as being based on "[t]he modern state['s] * * * duty to protect the public from those *who seek for one purpose or another to obtain its money*." *Id.* at 545 (emphasis added). As with commercial speech, this justification obviously dissolves when the speaker is not attempting to obtain money from his listener.

And as with commercial speech, this Court's decisions demonstrate that nonremunerative speech receives full constitutional protection—even when it is offered by a professional. In *Primus*, a lawyer was disciplined for the ethical violation of soliciting a potential client for the ACLU. *Primus*, 436 U.S. at 418-21. But because the lawyer's solicitation had consisted of offering the ACLU's *pro bono* services, the Court held that the lawyer's solicitation "c[a]me[] within the generous zone of First Amendment protection." *Id.* at 422, 431. In so holding, the *Primus* Court distinguished the case from another decided the same day, *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978), in which the Court upheld disciplinary action against an attorney for solicitation. The distinguishing factor: unlike in *Ohralik*, the solicitation in *Primus* was not "for pecuniary gain." *Primus*, 436 U.S. at 422; see also Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 Va. L. Rev. 567, 575 n.20 (2011) (*Primus* distinguished *Ohralik* by "expressly stress[ing] the commercial nature of the transaction" at issue in *Ohralik*).

Here, the Ninth Circuit concluded that any "speech within [the clinics'] walls related to their professional services is professional speech" "[b]ecause licensed

clinics offer medical and clinical services in a professional context." Pet. App. 30a. But this analysis is irreconcilable with *Primus*, given that in *Primus*, too, the speech "related to [the lawyer's] professional services," *id.*: it was an *offer* of such services to a potential client.

Failing to distinguish *Primus*, the Ninth Circuit effectively conceded that it was rejecting it, stating: "We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech." *Id.* 32a n.8. But this flatly disregards this Court's holding in *Primus* that a "lawyer who offers her services to a client pro bono" engages in fully protected speech.

C. Other pregnancy-center cases demonstrate confusion over commercial speech doctrine, which should be considered in this Court's disposition of this case.

As with the *NIFLA* court's errors with respect to this Court's content- and viewpoint-discrimination jurisprudence, the *NIFLA* court's error with respect to professional speech reflects widespread confusion in the lower courts regarding the application of this Court's commercial- and professional-speech precedents to pregnancy center speech regulations. This Court's commercial speech precedents make clear that the *sine qua non* of commercial speech is that the speech proposes a commercial transaction. Yet the Ninth Circuit has held, and the Fourth Circuit has suggested, that proposing a commercial transaction is not a necessary element of a commercial speech defense.

In *First Resort*, the same Ninth Circuit panel that decided *NIFLA* held that the regulated pregnancy-center speech was "commercial," even though the pregnancy center provided all of its services for free and proposed no commercial transactions to its clients. The speech regulated by the San Francisco ordinance was "statement[s] * * * concerning services provided by" pregnancy centers that do not provide or refer for abortions—that is, advertisements for such pregnancy centers' counseling services. 860 F.3d at 1272 (internal quotation marks omitted). But First Resort's advertisements were not proposals for a commercial transaction; they were efforts to attract listeners for the center's free counseling services, during which the center, for moral and religious reasons, would provide women with information about pregnancy in the hope that they would choose a non-abortion option. *Id.* at 1267-68, 1276.

The court nonetheless applied the commercial speech doctrine. It first recognized that "commercial speech is defined as speech that does no more than propose a commercial transaction," but it held that speech that satisfies the *Bolger* factors could also be considered commercial. *Id.* at 1272 (internal quotation marks omitted). It then held that the regulated speech satisfied the *Bolger* factors. Regarding the third factor, the court concluded that First Resort engaged in advertising for the "economic motive" of "solicit[ing] a patient base." *Id.* Even though First Resort "do[es] not * * * receive payments from patients for services rendered," the court reasoned, its "ability to fundraise" is improved the more women it serves, because it can use "client stories" in fundraising. *Id.* at 1273. Further, the court concluded, even if First Resort did *not* have

an economic motive for its speech—and thus even if the third *Bolger* factor was not satisfied—its speech could *still* be considered commercial, because the services it offers are "commercially valuable." *Id.* at 1273-74.

This Court's cases provide no support for the *First Resort* court's sweeping view of commercial speech. First, as explained above, the *Bolger* factors are useful only for evaluating speech that *in addition to* proposing a commercial transaction, also includes speech on political, religious, moral, or other noncommercial subjects. The *Bolger* factors cannot be used to render speech "commercial" that does not propose a commercial transaction at all. "[*T*]*he test* for identifying commercial speech," this Court has repeatedly held, looks for whether there has been a "proposal of a commercial transaction." *Discovery Network*, 507 U.S. at 423 (quoting *Fox*, 492 U.S. at 473-74). Because the *First Resort* court held the regulated speech to be "commercial" even though the pregnancy center did not propose a commercial transaction, the court clearly erred.

But the court also erred in its breathtakingly broad reading of the *Bolger* factors themselves. Under the *First Resort* court's view of *Bolger*—under which the mere possibility of improved fundraising provides the requisite "economic motive," *First Resort*, 860 F.3d at 1272—broad swaths of core political, religious, and moral advocacy could be regulated as commercial. To take one example, a church's advertisements for its worship services would qualify as commercial under the *First Resort* court's reasoning. A church, too, improves its fundraising opportunities by attracting more people to its services; the more congregants there are, the more likely it is that the offering plate will be

filled. And churches, too, often give away for free things of "commercial value," like musical performances, moral and spiritual instruction, and even "sacramental wine, communion wafers, [and] prayer beads." *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 683 F.3d 539, 554 (4th Cir. 2012) (*Greater Baltimore I*) (internal quotation marks omitted). But advertisements for worship services were precisely the kind of speech this Court held to be fully protected in *Reed*. 135 S. Ct. at 2225. And indeed, this Court more than seventy years ago rejected as absurd the notion that "the passing of the collection plate in church would make the church service a commercial project." *Murdock*, 319 U.S. at 111.

Strikingly, *First Resort*'s commercial speech reasoning rested *entirely* on other pregnancy-center cases. First, the *First Resort* court found "persuasive" (860 F.3d at 1273) the North Dakota Supreme Court's decision in *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176 (N.D. 1985). There, the court upheld as a regulation of "commercial speech" an injunction preventing pro-life pregnancy centers from falsely or misleadingly indicating in their advertisements that they performed abortions. *Id.* at 177, 179. The *Larson* court pioneered the unbounded view of commercial speech later adopted in *First Resort*, holding that because the pregnancy center's advertisements were placed "in a commercial context," the advertisements were commercial, even though the center argued that its advertisements constituted "advocacy of the pro-life position" and that it charged nothing for the advertised services. *Id.* at 180-81.

First Resort also relied on the Fourth Circuit's en banc decision in *Greater Baltimore II*. Unlike the laws

in *First Resort* and *Larson*, the *Greater Baltimore* law did not regulate advertising; indeed, it "applie[d] to all" pregnancy centers that do not provide or refer for abortions "*regardless* of whether they advertise at all." *Greater Baltimore I*, 683 F.3d at 558. For this reason, the district court rejected the government's argument that the ordinance regulated commercial speech, and the Fourth Circuit panel—correctly finding it "dispositive" that the ordinance "target[ed] speech regarding the provision of 'free services'" and that the regulated center did not "propos[e] any commercial transaction"—affirmed. *Id.* at 553-54.

The en banc Fourth Circuit, however, held that the government's "commercial speech theory should not have been so easily dismissed." *Greater Baltimore II*, 721 F.3d at 284. As relied upon by the *First Resort* court, the *Greater Baltimore II* court held that even if the speech regulated by the ordinance did not "satisf[y] the 'propose a commercial transaction' test," it could nonetheless be treated as commercial under *Bolger*. *Id.* at 284-85. And as in *First Resort*, the *Greater Baltimore II* court suggested that speech may be commercial if it is "directed at the providing of services" that are commercially valuable, even though the services were in fact provided for free. *Id.* at 284-86 (internal quotation marks omitted). The court therefore remanded for further discovery into whether the plaintiff center "possesse[d] economic interests apart from its ideological motivations." *Id.* at 285. Unsurprisingly, that discovery ultimately revealed that the center's "clearest motivation [was] not economic" and that the purported link between the center's advocacy and its fundraising was "speculative at best." *Greater Baltimore III*, 2018 WL 298142, at *4.

Meanwhile, at least two courts have recognized that because pregnancy centers that provide all of their services for free to advance a moral and religious mission do not propose a commercial transaction, their speech cannot be regulated as commercial. For instance, in a decision issued before *Greater Baltimore II*, the court in *Centro Tepeyac* held that a pregnancy center that was "motivated by social concerns" and provided its services "free of charge" could by definition not be held to be proposing "a commercial transaction." 779 F. Supp. 2d at 463-64. It thus held that the commercial speech doctrine did not apply. *Id.*; see also 5 F. Supp. 3d at 756-60 (again rejecting commercial speech argument after *Greater Baltimore II*).

Likewise, the district court in *Evergreen Ass'n, Inc.* v. *City of New York* held that because pregnancy centers' "missions—and by extension their charitable work—are grounded in their opposition to abortion and emergency contraception," their communications with women are not regulable as commercial speech. 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff'd in part, vacated in part on other grounds*, 740 F.3d 233 (2d Cir. 2014). The government offered the same workaround to this obstacle that the defendants would later offer in *First Resort* and *Greater Baltimore II*—that even if pregnancy centers do not charge for their services, their "fundraising prowess" is increased the better they are at "attracting clients." *Id.* (internal quotation marks omitted). But the court correctly rejected this argument, because pregnancy centers "do not advertise 'solely' for that purpose," and in any event, "the Supreme Court has never viewed 'charitable solicitation * * * as a variety of purely commercial speech.'"

Id. at 205-06 (quoting *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

* * *

Whatever the wisdom of the commercial- and professional-speech doctrines as a matter of first principles, these doctrines are stretched beyond recognition when they are applied to pro-life pregnancy centers that render all of their services for free and in furtherance of their moral and religious missions. Further, although this Court has been clear that the *sine qua non* of commercial speech is speech that proposes a commercial transaction, some courts even outside the pregnancy-center context have, like the courts in *First Resort* and *Greater Baltimore II*, incorrectly viewed the *Bolger* factors as a substitute for the propose-a-commercial-transaction test, rather than a test applied to speech that both proposes a commercial transaction and speaks to noncommercial matters.[14] The

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[14] See:

- *Facenda* v. *N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008) (applying only the *Bolger* test to determine whether speech is commercial);
- *Adventure Commc'ns, Inc.* v. *Ky. Registry of Election Fin.*, 191 F.3d 429, 440-41 (4th Cir. 1999) (same);
- *Proctor & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001) (same), *abrogated on other grounds by Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014);

Court should thus use this case as an opportunity to reaffirm the limitations on the commercial- and professional-speech doctrines, or otherwise agree to hear an additional case more squarely presenting the issue.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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• *Dryer* v. *Nat'l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (declaring that the *Bolger* factors determine whether speech is commercial).

Meanwhile, six circuits correctly recognize that *Bolger* applies only to "non-core" commercial speech—*i.e.*, speech that does not *just* propose a commercial transaction but also includes speech on other topics. See *Bad Frog Brewery, Inc.* v. *N.Y. State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998); *Semco, Inc.* v. *Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995); *Jordan* v. *Jewel Food Stores, Inc.*, 743 F.3d 509, 516-17 & n.6 (7th Cir. 2014); *Proctor & Gamble Co.* v. *Haugen*, 222 F.3d 1262, 1274-75 (10th Cir. 2000); *Edward Lewis Tobinick, MD* v. *Novella*, 848 F.3d 935, 950 (11th Cir. 2017); *Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

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JANUARY 2018

APPENDIX

AUSTIN ORDINANCE

ORDINANCE NO. 20120126-045

AN ORDINANCE AMENDING THE CITY CODE TO ADD CHAPTER 10-10 TO REQUIRE SIGNS AT UNLICENSED PREGNANCY SERVICE CENTERS; CREATING AN OFFENSE AND IMPOSING A PENALTY.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The City Code is amended by adding a new Chapter 10-10 to read as follows:

CHAPTER 10-10 UNLICENSED PREGNANCY SERVICE CENTERS.

§ 10-10-1 DEFINITIONS.

In this chapter:

(1) **UNLICENSED PREGNANCY SERVICE CENTER or CENTER** means an organization or facility that:

(a) as its primary purpose, provides pregnancy related services, including pregnancy testing and options counseling; and

(b) does not have a health care provider that is licensed by a state or federal regulatory entity maintaining a full time practice on site.

(2) **MEDICAL SERVICE** includes, without limitation, diagnosing pregnancy or performing a sonogram.

(3) **OWNER OR OPERATOR** means a person who owns, operates, or manages an unlicensed pregnancy service center.

§ 10-10-2 NOTICE REQUIRED.

(A) The owner or operator of an unlicensed pregnancy service center shall prominently display a black and white sign, in English and in Spanish, affixed to the entrance of the center so that the sign is conspicuously visible to a person entering the center, that accurately discloses the following information:

(1) whether the center provides medical services.

(2) if the center provides medical services, whether all medical services are provided under direction and supervision of a licensed health care provider; and

(3) if the center provides medical services, whether the center is licensed by a state or federal regulatory entity to provide those services.

(B) Each sign must be at least eight and one-half inches by eleven inches and the text must be in a font size of at least 36 point.

§ 10-10-3 PENALTY.

(A) An owner or operator commits an offense if the owner or operator violates this chapter.

(B) An offense under this article shall be punished by a fine of not less than $250 for the first offense, not less than $350 for a second offense,

and not less than $450 for a third or succeeding offense.

(C) A culpable mental state is not required, and need not be proved; for an offense under this chapter.

PART 2. This ordinance takes effect on February 6, 2012.

PASSED AND APPROVED

January 26, 2012

/s/ Lee Leffingwell
Mayor

APPROVED:

/s/ Karen M. Kennard
City Attorney

ATTEST:

/s/ Shirley A. Gentry
City Clerk

BALTIMORE CITY REVISED CODE

SUBTITLE 5

LIMITED-SERVICE PREGNANCY CENTERS

§ 3-501. "Limited-service pregnancy center" defined.

In this subtitle, "limited-service pregnancy center" means any person:

(1) whose primary purpose is to provide pregnancy-related services; and

(2) who:

(i) for a fee or as a free service, provides information about pregnancy-related services; but

(ii) does not provide or refer for:

(A) abortions; or

(B) nondirective and comprehensive birth-control services.

(Ord. 09-252.)

§ 3-502. Disclaimer required.

(a) *In general.*

A limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services.

(b) *How given.*

The disclaimer required by this section must be given through 1 or more signs that are:

(1) written in English and Spanish;

(2) easily readable; and

(3) conspicuously posted in the center's waiting room or other area where individuals await service.

(Ord. 09-252.)

§ 3-503. Violation notice.

If the Health Commissioner learns that a pregnancy center is in violation of this subtitle, the Commissioner shall issue a written notice ordering the center to correct the violation within 10 days of the notice or within any longer period that the Commissioner specifies in the notice.

(Ord. 09-252.)

§§ 3-504 to 3-505. ***{Reserved}***

§ 3-506. Enforcement by citation.

(a) *In general.*

The failure to comply with an order issued under § 3-503 {"Violation notice"} of this subtitle may be enforced by issuance of:

(1) an environmental citation under City Code Article 1, Subtitle 40 {"Environmental Control Board"}; or

(2) a civil citation under City Code Article 1, Subtitle 41 {"Civil Citations"}.

(b) *Process not exclusive.*

The issuance of a citation to enforce this subtitle does not preclude pursuing any other civil or criminal remedy or enforcement action authorized by law.

(Ord. 09-252.)

12/31/09

CALIFORNIA FACT ACT

Assembly Bill No. 775

CHAPTER 700

An act to add Article 2.7 (commencing with Section 123470) to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, relating to public health.

[Approved by Governor October 9, 2015. Filed with Secretary of State October 9, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 775, Chiu. Reproductive FACT Act.

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized.

This bill would enact the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which would require a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women. The bill would also require an unlicensed covered facility, as defined, to disseminate a

notice to all clients, as specified stating, among other things, that the facility is not licensed as a medical facility by the State of California.

The bill would authorize the Attorney General, city attorney, or county counsel to bring an action to impose a specified civil penalty against covered facilities that fail to comply with these requirements.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women. Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or obtaining care, that these facilities are not licensed to provide medical care.

SEC. 2. The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

SEC. 3. Article 2.7 (commencing with Section 123470) is added to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, to read:

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that

is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility offers pregnancy testing or pregnancy diagnosis.

(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:

(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.

(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

123472. (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state:

"California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

(2) The information shall be disclosed in one of the following ways:

(A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.

(B) A printed notice distributed to all clients in no less than 14-point type.

(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care

Services for the county in which the facility is located.

(1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a fi offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.

(2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

HARTFORD ORDINANCE

Introduced by: Mayor Luke A. Bronin

SUBSTITUTE FOR ITEM #15

HEADING AND PURPOSE:

AN ORDINANCE AMENDING CHAPTER 17 OF THE HARTFORD MUNICIPAL CODE TO ADD ARTICLE VI -PREGNANCY INFORMATION DISCLOSURE AND PROTECTION

COURT OF COMMON COUNCIL,
CITY OF HARTFORD

December 11, 2017

Be it ordained by the Court of Common Council of the City of Hartford that Chapter 17 of the Municipal Code be amended to add Article VI. — Pregnancy Information Disclosure and Protection as follows.

ARTICLE VI. - PREGNANCY INFORMATION DISCLOSURE AND PROTECTION

Section 17-138. Findings

(a) The Council's intention is to ensure that individuals in Hartford have access to comprehensive information about, and timely access to, all types of reproductive health services including, but not limited to, pregnancy, prenatal care, emergency contraception, and abortion.

(b) Pregnancy decisions are time sensitive, and care early in pregnancy is important, whether a woman chooses to continue her pregnancy and needs prenatal care or wants to end her pregnancy and needs an abortion. Connecticut prioritizes the health of women

and families, and low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Connecticut's Medicaid program.

(c) Prenatal care, abortion and emergency contraception are all time sensitive services. Increasing the proportion of women receiving adequate and early prenatal earn is a pronounced objective of the United States Department of Health and Human Services. The federal Centers for Disease Control and Prevention urges that comprehensive prenatal care begin as soon as a woman decides to become Pregnant. Similarly to prenatal care, delayed access to abortion and emergency contraception poses a threat to public health. Delay in accessing abortion or emergency contraception creates increased health risks and financial burdens and may eliminate a women's ability to obtain these services altogether, severely limiting her reproductive health options. Delays in deciding to terminate a pregnancy, in particular, may mean that a less invasive method is no longer available or that the woman is prevented from choosing an abortion altogether.

(d) A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

(e) Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and the City respects the right of individuals to express and promote such beliefs.

(f) In recent years, clinics that seek to counsel clients against abortion have become common throughout

Connecticut, with more than 20 such clinics in the state. These clinics are often referred to as crisis pregnancy centers ("CPCs"). Although some CPCs are licensed to provide various medical services to pregnant women, most CPCs are not licensed medical clinics.

(g) While some CPCs openly acknowledge, in their advertising and their facilities, that they do not provide abortions or emergency contraception or refer clients to other providers of such services, many CPCs, through their appearance and services offered, appear to offer abortion services and unbiased and comprehensive counseling. Moreover, some CPCs have engaged in conduct that intentionally leads clients to believe that they are in a reproductive health care facility and/or have received reproductive health care and counseling from a licensed medical provider when, in fact, they have not.

(h) The Council finds that there are CPCs in Hartford that advertise as medical facilities and use signage similar to actual medical facilities.

(i) It is vital that pregnant women in Connecticut know whether they are getting medical care from licensed professionals. Facilities that advertise and provide pregnancy testing and care must ad vise clients, at the time they are seeking or obtaining care, whether or not these facilities have licensed medical professionals on staff who provide or directly supervise that care.

(j) Many CPCs advertise on billboards, mass-transit facilities, and through websites, and some CPCs utilize a technology that allows them to target social

media advertisements to women when they approach or enter an abortion clinic.

(k) Most clients do not come to CPCs as a result of a referral from a medical professional. Clients with an unplanned pregnancy or at risk of an unplanned pregnancy are often experiencing emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by CPCs. These circumstances raise the need for regulation that is more protective of consumers of pregnancy center services.

(l) Because of the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City. When a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy. Under these circumstances a client may also lose the option to choose a less invasive method, or to terminate the pregnancy at all.

(m) The City respects the right of pregnancy services centers to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit, or curtail advocacy. However, women seeking medical care or those who have chosen to terminate a pregnancy should not be misled and delayed by the actions or false advertising of CPCs.

(n) After carefully balancing the constitutionally protected right of a woman to choose to terminate her

pregnancy. the right of individuals to express their religious and ethical beliefs about abortion, and the harm to women effected by even slight delays that can be caused by false advertising for pregnancy and/or abortion services, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy services centers and to require that pregnancy centers make certain disclosures to ensure that patients are adequately informed when they seek services at a pregnancy services center.

Section 17-139. Definitions

For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient, within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates

to health insurance and/or the past, present, or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provisions of federal, state, or local law to provide medical services.

(f) "Pregnancy services center" shall mean a facility, including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers to provide or does provide obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(1) The facility offers pregnancy testing and/or pregnancy diagnosis;

(2) The facility bas staff or volunteers who wear medical attire and uniforms

(3) The facility contains one or more examination tables;

(4) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(5) The facility has staff or volunteers who collect health information from clients; or

(6) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or

more of the characteristics listed above, "Pregnancy service center" does not include or mean any facility or office that is licensed by the state of Connecticut or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all medical services mentioned in this section at all times during which these services are being provided at the facility, including abortion, emergency contraception, prenatal care, pregnancy diagnosis and testing, obstetric ultrasounds or sonograms.

(g) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(h) "Prenatal care" shall mean services consisting of physical examination, pelvic examination, or clinic laboratory services provided to a woman during pregnancy. Clinic laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological, or pathological examination of materials derived from the human body, for the purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

Section 17-140. Required Disclosures

(a) A pregnancy services center shall disclose if it does not have a licensed medical provider on the premises who provides or directly supervises the provision of all medical services provided at such pregnancy services center at all times during which these services are being provided.

(b) The disclosures required by this section must be provided:

(1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the City Department of Health and Human Services on (A) at least one sign conspicuously posted in the entrance of the pregnancy services center; (B) at least one additional sign posted in any area where clients wait to receive services; and (C) on any website of the pregnancy services center; and

(2) orally, whether in person or by telephone communication, whenever a client or prospective client requests any of the following services: (A) abortion, (B) emergency contraception, or (C) prenatal care.

(c) Penalty. Covered facilities that fail to comply with the requirements of this Section (Required Disclosures) of this Chapter are liable for a civil penalty of one hundred dollars ($100) per offense. Each day any such violations continue shall constitute a separate offense.

Section 17-141. Prohibition of false, misleading, or deceptive advertising

(a) It is unlawful for any pregnancy services center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated any statement concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue, misleading, or deceptive, whether by statement or omission, that the pregnancy services center knows, or which by the exercise or reasonable care should know, to be untrue or misleading. This prohibition

applies to statement s made before the public in the city or statements that are made, disseminated or caused to be disseminated from the city before the public anywhere, in any newspaper or other publication, or in any other manner or means whatsoever, including over the Internet.

(b) It is unlawful for any pregnancy services center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

(c) Penalty. Covered facilities that fail to comply with the requirements of this Section (Prohibition of False, Misleading. or Deceptive Advertising) of this Chapter are liable for a civil penalty of one hundred dollars ($100) per offense. Each day any such violations continue shall constitute a separate offense.

Section 17-142. Enforcement and opportunities to cure

(a) The City Department of Health and Human Services may enforce the provisions of Section 3 (Required Disclosures) and Section 4 (Prohibition of False, Misleading, or Deceptive Advertising) of this Chapter through a civil action in any court of competent jurisdiction, following exhaustion of administrative remedies. Prior to initiating a civil action, the City shall:

(1) Provide the covered facility with written notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the vio-

lation within ten (10) days from the date the notice is sent to the facility.

(2) Verify that the violation was not connected within the ten-day period described in paragraph (1).

(b) Any civil penalties imposed by the court pursuant to Sections 3(e) or 4(c) of this Chapter shall be paid to the City of Hartford.

(c) Upon a finding by a court of competent jurisdiction that a pregnancy services center has violated Section 3 or 4 of this Chapter, the City shall be entitled to recover penalties from each and every party responsible for the violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

(d) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(e) Nothing in this Chapter shall be interpreted as creating a right of action for any patty other than the City.

(f) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

Section 1 7-143. General provisions.

(a) Severability. If any section, subjection, sentence, clause, or phrase of this ordinance is for any reason

held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance.

(b) No Conflict with State or Federal Law. Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) Undertaking for the General Welfare. In adopting and implementing this ordinance, the City of Hartford is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

This ordinance shall become effective July 1, 2018

HAWAI'I STATUTE

Approved by the Governor
on July 11. 2017
The Senate
Twenty-Ninth Legislature, 2017
State of Hawaii
Act 200, S.B. No. 501, S.D. 1, H.D. 2, C.D. 1

A BILL FOR AN ACT

RELATING TO HEALTH

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that all women in Hawaii, regardless of income, should have meaningful access to effective reproductive health services. Public programs providing insurance coverage and direct services for reproductive health care and counseling to eligible, low-income women are currently available through the department of health and department of human services.

Thousands of women in Hawaii are in need of publicly-funded family planning services, contraception services and education, pregnancy-related services, prenatal care, and birth-related services. In 2010, sixteen thousand women in Hawaii experienced an unintended pregnancy, which can carry enormous social and economic costs to both individual families and to the State. Many women in Hawaii, however, remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services.

Because family planning decisions are time sensitive and care early in pregnancy is important, Hawaii must make every possible effort to advise women of all available reproductive health programs. In Hawaii, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Med-QUEST and the department of health's family planning program. Providers who contract with these programs are able to immediately enroll patients in these programs at the time of a health center visit.

Requiring facilities that provide pregnancy- or family planning-related services to provide accurate health information arid to inform clients of the availability of and enrollment procedures for reproductive health programs will help ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive health decisions.

The purpose of this Act is to ensure that women in Hawaii are able to make personal reproductive health decisions with services that are available.

SECTION 2. Chapter 321, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

"§321-A Limited service pregnancy centers; notice of reproductive health services.

(a) For purposes of this section, "limited service pregnancy center" or "center":

(1) Means a facility that:

(A) Advertises or solicits clients or patients with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;

(B) Collects health information from clients or patients; and

(C) Provides family planning or pregnancy-related services, including but not limited to obstetric ultrasound, obstetric sonogram, pregnancy testing, pregnancy diagnosis, reproductive health counseling, or prenatal care; and

(2) Shall not include a health care facility. For the purposes of this paragraph, a "health care facility" means any facility designed to provide comprehensive health care, including but not limited to hospitals licensed pursuant to chapter 321, intermediate care facilities, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, federally qualified health centers, and other facilities providing similarly organized comprehensive health care services.

(b) Every limited service pregnancy center in the State shall disseminate on-site to clients or patients the following written notice in English or another language requested by a client or patient:

"Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.

To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.

Only ultrasounds performed by qualified healthcare professionals and read by licensed clinicians should be considered medically accurate. "

The notice shall contain the internet address for online medical assistance applications and the statewide phone number for medical assistance applications.

(c) The information required by subsection (b) shall be disclosed in at least one of the following ways:

(1) A public notice on a sign sized at least eight and one-half inches by eleven inches, written in no less than twenty-two point type, and posted in a clear and conspicuous place within the center' s waiting area so that it may be easily read by individuals seeking services from the center; or

(2) A printed or digital notice written or rendered in no less than fourteen point type that is distributed individually to each patient or client at the time of check-in for services; provided that a printed notice shall be available to all individuals who cannot or do not wish to receive the notice in a digital format.

(d) No limited service pregnancy center that collects health information from any individual seeking or receiving its services shall disclose any individually identifiable health information to any other person, entity, or organization without express written authorization from the subject individual. Any disclosure made under this section shall be limited by the express terms of the written authorization and all applicable state and federal laws and regulations, including the federal Health Insurance Portability and

Accountability Act of 1996 and title 45 Code of Federal Regulations part 164.

(e) A limited service pregnancy center that provides or assists in the provision of pregnancy testing shall provide the individual tested with a free written statement of the results of the pregnancy test in English or another language requested by a client or patient immediately after the test is completed.

(f) Upon receipt of a written request from an individual to examine or copy all or part of the individual's recorded health information or other information retained by a limited service pregnancy center, the center shall, promptly as required under the circumstances but in no case later than fifteen working days after receiving the request:

(1) Make the information available for examination by the individual during regular business hours;

(2) Provide a free copy to the individual, if requested;

(3) Inform the individual if the information does not exist or cannot be found; and

(4) If the center does not maintain the record or information, inform the individual of that fact and provide the name and address of the entity that maintains the record or information.

§321-B Limited service pregnancy centers; enforcement; private right of action.

(a) A limited service pregnancy center that violates section 321-A shall be liable for a civil penalty of $500 for a first offense and $1,000 for each subsequent offense. If the center is provided with reasona-

ble notice of noncompliance, which informs the center that it is subject to a civil penalty if it does not correct the violation within thirty days from the date the notice is sent to the center, and the violation is not corrected as of the expiration of the thirty-day notice period, the attorney general may bring an action in the district court of the district in which the center is located to enforce this section.

A civil penalty imposed pursuant to this subsection shall be deposited to the credit of the general fund.

(b) Any person who is aggrieved by a limited service pregnancy center's violation of section 321-A may bring a civil action against the limited service pregnancy center in the district court of the district in which the center is located to enjoin further violations and to recover actual damages sustained together with the costs of the suit including reasonable attorneys' fees. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained. If damages are awarded pursuant to this subsection, the court may, in its discretion, impose on a liable center a civil fine of not more than $1,000 to be paid to the plaintiff.

A party seeking civil damages under this subsection may recover upon proof of a violation by a preponderance of the evidence.

For the purposes of this subsection, "person" includes a natural or legal person.

(c) The enforcement procedure and remedies provided by this section shall be in addition to any other procedure o remedy that may be available to the

State or a person aggrieved by a violation of this chapter.

(d) This section and section 321-A are not intended to require regulation or oversight of limited service pregnancy centers by the department of health."

SECTION 3. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

APPROVED this 11TH day of July 2017

/s/ David Y. Ige
Governor of the State of Hawaii

THE SENATE OF THE STATE OF HAWAII

Date: May 2, 2017
Honolulu, Hawaii 96813

We hereby certify that the foregoing Bill this day passed Final Reading in the

Senate of the Twenty-ninth Legislature of the State of Hawaii, Regular Session of 2017.

/s/ Ronald D. Kouchi, President of the Senate

/s/ Clerk of the Senate

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: May 2, 2017
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Twenty-Ninth Legislature of the State of Hawaii, Regular Session of 2017.

/s/ Joseph M. Souki
Speaker
House of Representatives

/s/ Brian L. Takeshita
Chief Clerk
House of Representatives

ILLINOIS ACT

Public Act 099-0690 LRB09905684HEP25727b

SB1564Enrolled

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Health Care Right of Conscience Act is amended by changing Sections 2, 3, 6, and 9 and by adding

Sections 6.1 and 6.2 as follows:

(745 ILCS 70/2) (from Ch. 111 1/2, par. 5302)

Sec. 2. Findings and policy. The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in providing, paying for, or refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care. It is also the public policy of the State of Illinois to ensure that patients receive

timely access to information and medically appropriate care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/3) (from Ch. 111 1/2, par. 5303)

Sec. 3. Definitions. As used in this Act, unless the context clearly otherwise requires:

(a) "Health care" means any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons;

(b) "Physician" means any person who is licensed by the State of Illinois under the Medical Practice Act of 1987;

(c) "Health care personnel" means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services;

(d) "Health care facility" means any public or private hospital, clinic, center, medical school, medical training institution, laboratory or diagnostic facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein health care services are provided to any person, including physician organizations and associations, networks, joint ven-

tures, and all other combinations of those organizations;

(e) "Conscience" means a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths;

(f) "Health care payer" means a health maintenance organization, insurance company, management services organization, or any other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product; and

(g) "Undue delay" means unreasonable delay that causes impairment of the patient's health.

The above definitions include not only the traditional combinations and forms of these persons and organizations but also all new and emerging forms and combinations of these persons and organizations.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6) (from Ch. 111 1/2, par. 5306)

Sec. 6. Duty of physicians and other health care personnel. Nothing in this Act shall relieve a physician from any duty, which may exist under any laws concerning current standards of medical practice or care, to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form

of medical practice or health care service that is contrary to his or her conscience.

Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6.1 new)

Sec. 6.1. Access to care and information protocols. All health care facilities shall adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this Act only apply if conscience-based refusals occur in accordance with these protocols. These protocols must, at a minimum, address the following:

(1) The health care facility, physician, or health care personnel shall inform a patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.

(2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option requested by a patient because the health care service is contrary to the conscience of the health care facility, physician, or

health care personnel, then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3).

(3) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.

(4) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient in accordance with Illinois law, without undue delay.

(745 ILCS 70/6.2 new)

Sec. 6.2. Permissible acts related to access to care and information protocols. Nothing in this Act shall be construed to prevent a health care facility from requiring that physicians or health care personnel working in the facility comply with access to care and information protocols that comply with the provisions of this Act.

(745 ILCS 70/9) (from Ch. 111 1/2, par. 5309)

Sec. 9. Liability. No person, association, or corporation, which owns, operates, supervises, or manages a health care facility shall be civilly or criminally liable to any person, estate, or public or private entity by reason of refusal of the health care facility to permit or provide any particular form of health care service which violates the facility's conscience as documented in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents.

Nothing in this Act shall be construed so as to relieve a physician, health care personnel, or a health care facility from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

KING COUNTY, WASHINGTON, REGULATION

KING COUNTY

Signature Report

July 21, 2017

R&R BOH17-04

Proposed No. BOH17-0.42

Sponsors

A RULE AND REGULATION relating to disclosure of information by limited service pregnancy centers; adding a new Title A to the BOH Code; enacted pursuant to RCW 70.05.060, including the latest amendments or revisions thereto.

BE IT ADOPTED BY THE KING COUNTY BOARD OF HEALTH:

SECTION 1. **Findings:**

A. The King County Board of Health finds that the Board of Health has a compelling interest in ensuring that women who might be pregnant are notified about whether or not the limited service pregnancy centers they visit for ultrasound, pregnancy testing or pregnancy diagnosis or pregnancy options counseling are health care facilities. Lack of such a notification presents a threat to the public health because it might delay women from having the necessary information to seek comprehensive family planning and reproductive health care services or obstetric health care available elsewhere, including information enabling them to

seek free or low-cost avenues of receiving those services.

B. All women in King County, regardless of income, should have access to comprehensive family planning and reproductive health care services. Further, all pregnant women in King County, who might wish to continue their pregnancies, should have access to obstetric health care. Ensuring access to those services has been shown Tobe critical for saving lives and reducing ill-health for both women and their children. Forewomen who might be pregnant, particularly if their pregnancies were unintended, access to those services might be even more critical.

C. Research has shown that investments in comprehensive sexual and reproductive health result in benefits such as: preventing unintended pregnancies, which can improve birth spacing and outcomes; improving maternal health; increasing prevention or early diagnosis of breast or cervical cancer; and preventing, diagnosing and treating sexually transmitted infections, including those that could be transmitted during gestation or birth.

D. Health care facilities providing health care to women who might be pregnant either:. Provide important information for women on how to access comprehensive family planning and reproductive health care services and obstetric health care, including information to help pregnant women find health insurance, local doctors or midwives and other community resources to support healthy pregnancies; or. Provide those services themselves.

E. Conversely, some limited service pregnancy centers have been reported to provide little or no in-

formation on the availability of free, low-cost or full-cost comprehensive family planning and reproductive health care services to women. Also those limited service pregnancy centers do not provide comprehensive family planning and reproductive health care services or obstetric health care for women. Beyond potential misunderstanding as to whether women are receiving care from health care. Facilities because of a lack of disclosure from the facilities that the women are not receiving that care, some limited service pregnancy centers have been reported to misinform women about their health and their health care options. That misinformation can delay access to comprehensive family planning and reproductive health care services and obstetric health care and can lead to more risky reproductive decisions, such as later-term and expensive abortions. Thus, lack of information, namely failure to notify the women who might be pregnant and visit these limited service pregnancy centers for ultrasounds, pregnancy testing and diagnosis, or pregnancy options counseling, that the facilities are not health care facilities, is a threat to the public health.

F. In 2014, an estimated 429,910 women in Washington were in need of publicly funded contraceptive services and supplies. That year, Public Health - Seattle & King County served 9,534 family planning clients. It is estimated that 288 unintended pregnancies are prevented per every 1,000 users of publicly funded contraceptive services. In 2014 Public Health - Seattle & King County is estimated to have prevented nearly 2,120 unintended pregnancies, which are estimat-

ed to translate to 1,0 0 fewer births from unintended pregnancies, 720 fewer abortions and 340 fewer miscarriages.

G. While every year thousands of women in King County are in need of publicly funded comprehensive family planning, reproductive health care services and obstetric health care, many, including women who learn they are pregnant, remain unaware of the programs available to provide them with these services free or at low cost. For women facing unwanted or otherwise crisis pregnancies, the public health risks of lacking access to information on where and how they can obtain free or low-cost comprehensive family planning and reproductive health care services and obstetric health care, are even more dangerous.

H. In addition to the time-sensitive nature of the decision about whether or not to continue a pregnancy, for women who face additional challenges such as intimate partner violence, behavioral health issues or medical diagnoses that can lead to complications during pregnancy, having information enabling them to more quickly access obstetric health care, comprehensive family planning and reproductive health care services might prove life-altering for their health and for the health of their future children, if they decide to and are able to continue the pregnancies.

I. Further, pregnancy itself has been identified as a time of high risk for women. The prevalence of both antenatal and postnatal psychological distress has been studied, with some studies finding that socioeconomic deprivation and psychological distress tend to occur. Research suggests that there is a positive association between antenatal distress and birth out-

comes. There is also research on the impact of maternal mental health, which is known to have lasting implications on child and adolescent behavior. Consequently, timely access for pregnant women to health care facilities, which have the tools to assess for and address those needs, is imperative for the short-term and long-term public health.

J. It is vital that pregnant women in King County know when they are receiving care from health care facilities, as delay in accessing that care resulting from lack of information or misinformation could permanently alter the reproductive decisions available to them and the adequacy of their prenatal care. Ensuring that limited service pregnancy centers notify that they are not health care facilities is an effective way to help women determine whether the facilities have the requisite staff to either assist or hinder the women's efforts to make timely reproductive and prenatal care decisions. Therefore, King County has a public health interest in supplementing its efforts to ensure that women who might be pregnant know who is providing their pregnancy-related care.

SECTION 2. There is hereby created a new Title 4A in the Board of Health Code, to be named Information Disclosure for Care Other Than Health Care.

SECTION 3. Sections 4, 5, 6 and 7 of this rule should constitute a new chapter in the new Title of the Board of Health Code created in section 2 of this rule.

NEW SECTION. SECTION 4. **Purpose – liberal construction – scope – intent.**

A. This chapter is enacted as an exercise of the Board of Health powers of King County to protect and preserve the public health, safety and welfare. Its provisions shall be liberally construed for the accomplishment of these purposes.

B. It is the intent of this chapter to place the obligation of complying with its requirements upon limited service pregnancy centers designated by this chapter within its scope, and any provision of or term used in this chapter is not intended to impose any duty whatsoever upon Public Health - Seattle & King County or any of its officers or employees, for whom the implementation or enforcement of this chapter shall be discretionary and not mandatory.

NEW SECTION. SECTION 5. **Definitions.** For the purposes of this chapter:

A. "Clear and conspicuous" means:

1. Larger point type than the surrounding text;

2. In contrasting type, font or color to the surrounding text of the same size; and

3. Set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

B. "Health care facility" means a hospital, clinic, nursing home, laboratory, 1office, or similar place where a licensed, certified, registered, or otherwise authorized 1health care provider conducts functions that make it governed by chapter 70.02 RCW.

C. "Health information" means any oral or written information in any form or 1medium that relates to

the past, present or future physical or mental health or condition of a client.

D. "Limited service pregnancy center" means a facility that is not a health care facility and whose primary purpose is to provide either pregnancy options counseling or 1pregnancy tests, or both, for a fee or as a free or low-cost service; and that satisfies two or 1more of the following:

1. The facility offers obstetric ultrasounds;

2. The facility offers pregnancy testing;

3. The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests or pregnancy options counseling; and

4. The facility has staff or volunteers who collect health information from clients.

NEW SECTION. SECTION 6. **Disclosure – required – manner.**

A. A limited service pregnancy center shall disseminate to clients on site and in any print and digital advertising materials including Internet web sites, the following notice in English, Spanish, Vietnamese, Russian, Somali, Chinese, Korean, Ukrainian, Amharic and Punjabi: "This facility is not a health care facility."

B. The on-site notice shall be on a sign at least A3 size paper and written in at least forty-eight-point type, and shall be posted conspicuously, in a manner that it is 1easily read, at the entrance of the facility and at least one additional area where

persons 1wait to receive services. The notice shall not contain other statements or markings.

C. The notice in the advertising materials shall be clear and conspicuous.

D. The director of Public Health - Seattle & King County shall make available a downloadable on-site notice on the Public Health - Seattle & King County Internet web site.

NEW SECTION. SECTION 7. **Enforcement – penalties.**

A. The director of Public Health - Seattle & King County may utilize BOH chapter 1.08 to enforce the requirements of this chapter, consistent with subsection B. of this section.

B. An entity violating this chapter is subject to a civil penalty of up to one 1hundred dollars. Each day upon which a violation occurs or is permitted to continue constitutes a separate violation.

SECTION 8. Severability. If any provision of this rule or its application to any person or circumstance is held invalid, the remainder of the rule or the application of the provision to other persons or circumstances is not affected.

R&R BOH17-04 was introduced on 7/20/2017 and passed as amended by the Board of Health on 7/20/2017, by the following vote:

Yes: 11 - Mr. Baker, Dr. Danielson, Ms. Bagshaw, Mr. McDermott, Ms. Wales, Mr. Dembowski, Dr. Daniell, Ms. Gonzalez and Ms. Juarez

No: 2- Ms. Lambert

Excused: 0

BOARD OF HEALTH
KING COUNTY, WASHINGTON

/s/ Rod Dembowski, Chair

ATTEST: Melani Pedroza, Clerk of the Board

Attachments: None

MONTGOMERGY COUNTY, MD, ORDINANCE

Clerk's Note: added the word "services" on line 14 to reflect Council action.

CORRECTED COPY
Resolution No.: 16-1252
Introduced: November 10, 2009
Adopted: February 2, 2010

COUNTY COUNCIL

FOR MONTGOMERY COUNTY, MARYLAND

SITTING AS THE MONTGOMERY COUNTY BOARD OF HEALTH

By: Councilmembers Trachtenberg, Navarro, Floreen, Elrich, Leventhal, and Berliner

SUBJECT: Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers

Background

1. County Code §2-65, as amended effective August 10, 2000, provides that the County Council is, and may act as, the County Board of Health, and in that capacity may adopt any regulation which a local Board of Health is authorized to adopt under state law.

2. Maryland Code Health-General Article §3-202(d) authorizes the County Board of Health to adopt rules and regulations regarding any nuisance or cause of disease in the County.

3. On December 1, 2009, the County Council held a public hearing on this regulation. As required by law,

each municipality in the County and the public were properly notified of this hearing.

4. On January 25, 2010, the Health and Human Services Committee held a worksession on this regulation and recommended the Council adopt the regulation as amended.

5. The County Council, sitting as the Board of Health, finds after hearing the testimony and other evidence in the record of the public hearing that requiring a disclaimer for certain pregnancy resource centers is necessary to protect the health of County residents. The Board of Health's concern is that clients may be misled into believing that a Center is providing medical services when it is not. Clients could therefore neglect to take action (such as consulting a doctor) that would protect their health or prevent adverse consequences, including disease, to the client or the pregnancy.

Action

The County Council for Montgomery County, Maryland, sitting as the County Board of Health, approves the following regulation:

Required Disclaimers for Certain Pregnancy Resource Centers Definitions.

(a) **Definitions.**

(1) ***"Client"*** means a client or potential client.

(2) ***"Licensed medical professional on staff"*** means one or more individuals who:

(A) are licensed by the appropriate State agency under Title 8, 14, or 15 of the Health Occupations Article of the Maryland Code;

(B) provide medical-related services at the Center by either:

(i) providing medical services to clients at the Center at least 20 hours per week; or

(ii) directly overseeing medical services provided at the Center; and

(C) are employed by or offer their services at the Center.

(3) ***"Limited Service Pregnancy Resource Center"*** or ***"Center"*** means an organization, center, or individual that:

(A) has a primary purpose to provide pregnancy-related services;

(B) does not have a licensed medical professional on staff; and

(C) provides information about pregnancy-related services, for a fee or as a free service.

(b) **Disclaimer required.**

(1) A limited service pregnancy resource center must post at least 1 sign in the Center indicating that:

(a) the Center does not have a licensed medical professional on staff; and

(b) the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.

(2) The sign required in paragraph (b)(l) must be:

(a) written in English and Spanish;

(b) easily readable; and

(c) conspicuously posted in the Center's waiting room or other area where individuals await service.

(c) **Enforcement.**

(1) Any violation of this regulation is a Class A civil violation.

(2) The County Attorney may file an action in a court with jurisdiction to enjoin repeated violations of this regulation.

(3) The Department of Health and Human Services must investigate each complaint alleging a violation of this regulation and take appropriate action, including issuing a civil citation when compliance cannot be obtained otherwise. If the Department learns that a limited service pregnancy resource center is in violation of this regulation, the Department must, before issuing a citation, issue a written notice ordering the Center to correct the violation within either:

(a) 10 days of the notice; or

(b) a longer period that the Department specifies in the notice.

(d) **Applicability**. This regulation applies Countywide.

(e) **Severability**. If the application of this regulation or any part of it to any facts or circumstances is held invalid, the rest of the regulation and its application to all other facts and circumstances is intended to remain in effect.

(f) **Effective Date**. This regulation takes effect on the date on which it is adopted.

This is a correct copy of Council action.

/s/ Linda M. Lauer, Clerk of the Council

NEW YORK REGULATION

Department of Consumer Affairs Notice of Adoption of Rule

Notice of Adoption of an Amendment to Chapter 5 of Title 6 of the Rules of City of New York by adding a new Subchapter P regarding pregnancy services centers.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the Department of Consumer Affairs (the "Department") by Section 2203 of the New York City Charter and Section 20-816(f)(1) of Chapter 5, Subchapter 17, of Title 20 of the Administrative Code of the City of New York and in accordance with the requirements of Section 1043 of the New York City Charter, of the adoption by the Department of Sections 5-266, 5-267, 5-268, 5-269, 5-270, and 5-271 of Title 6 of the Rules of the City of New York, Chapter 5, Subchapter P, to implement and carry out the provisions of Local Law 17 of 2011 regarding the disclosure that pregnancy service centers must make.

This rule was proposed and published on December 10, 2015. The required public hearing was held on January 11, 2016. The rule will be effective on May 27, 2016.

Statement of Basis and Purpose of Rule

Section 20-816(b) of the Administrative Code, enacted as part of section 2 of Local Law 17 of 2011, provides that a pregnancy services center "shall disclose if it does or does not have a licensed medical provider on staff who provides or directly supervises the provi-

sion of all of the services at such pregnancy services center." Section 20-815(g) defines a pregnancy services center as "a facility, including a mobile facility, the primary purpose of which is to provide services to women who are or may be pregnant, that either: (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility." Section 20-815(g) excludes from this definition "a facility that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all services described in this subdivision that are provided at the facility."

Section 20-816(f) of the Administrative Code requires that the disclosure must be made "(1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the commissioner on (i) at least one sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of such pregnancy services center in clear and prominent letter type and in a size and style to be determined in accordance with rules promulgated by the commissioner". Section 20-816(f) additionally requires that the disclosure must be made orally.

The rules:

- Clarify the meanings of the following terms: "services", "directly provide", "directly supervise", "social media site", and "social network site".

- Clarify which facilities are excluded from the definition of "pregnancy services center".
- Specify the language of the disclosure, and set forth the size, color and location of the signs required to be posted at the pregnancy services center and in advertisements promoting the services of the pregnancy services center.
- Specify the language of the disclosure that must be made orally.
- Clarify that a facility's distribution of a pregnancy test kit shall not, by itself, be sufficient to establish that it has the "appearance of a licensed medical facility," provided that the test is self- administered, self-diagnosed, and self-interpreted.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Rule Amendment

Section 1. Chapter 5 of Title 6 of the Rules of the City of New York is amended by adding a new subchapter P to read as follows:

SUBCHAPTER P

PREGNANCY SERVICES CENTERS

§ 5-266. Definitions.

As used in this chapter, the following terms have the following meanings:

Directly provide. The term "directly provide" means that the licensed medical provider provides the service.

Directly supervise. The term "directly supervise" means that the licensed medical provider is on site and directly overseeing the provision of the service from beginning to end.

Services. The term "services" mean s abortion, emergency contraception, obstetric ultrasounds, obstetric sonograms, prenatal care, pregnancy testing, pregnancy diagnosis, and other medical and/or pharmaceutical services.

Social media site or social network site. The term "social media site" or "social network site" means a form of electronic communication, such as a website for social networking or microblogging, which allows users to interact or through which users create online communities to share information, ideas, personal messages, and other content, and includes, but is not limited to, Facebook, Twitter, YouTube, Flickr, LinkedIn, Tumblr and Myspace.

§ 5-267. Exemption.

A pregnancy services center shall not include a facility:

(a) that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services; or

(b) where a licensed medical provider is present to directly provide or directly supervise the provision of all services defined in Section 5-266 of this Subchapter that are provided at the facility.

§ 5-268. Display of Sign for Required Disclosure.

(a) Every pregnancy services center must display at its facility, including a mobile facility, a sign provided by the Department stating in English and Spanish: "This facility does not have a licensed medical provider on site to provide or supervise all services." The Department will provide both signs on its website for downloading by pregnancy services centers. The sign will measure eleven (11) inches by seventeen (17) inches and the lettering will be one inch high.

(b) Every pregnancy services center must post the sign at every public entrance. If the pregnancy services center is located in an office building or other structure containing two or more independent units, the sign must be posted at each entrance used exclusively for entry to the pregnancy services center. The sign must be: (1) posted on the outside of the entrance door and so that the distance from the top of the sign to the floor is between sixty-six (66) and seventy (70) inches and the distance between the frame of the door and the closest edge of the sign is not more than twelve (12) inches; (2) clearly and conspicuously visible to the client as she or he enters the pregnancy services center; and (3) laminated or protected by a clear sheeting or other suitable material so that the text will not be destroyed, soiled, distorted, or rendered illegible.

(c) Every pregnancy services center must post at least one sign in every area where clients wait to receive services. If the waiting area contains a reception desk, the sign must be posted on the reception desk or on a wall at a location not greater than 12 inches from the reception desk. If the sign is posted

on a wall, it must be posted so that the distance from the top of the sign to the floor is between sixty-six (66) and seventy (70) inches.

§ 5-269. Disclosures in Advertising.

(a) "Advertisement promoting the services of a pregnancy services center" includes all promotional materials, statements, visual descriptions, or other visual representations of any kind disseminated in print or electronically, including, but not limited to, mailings, postcards, signs, business cards, flyers, hand-outs, brochures, banners, billboards, subway or bus signs, window signs, store-front signs, newspaper print advertisements and listings, telephone directory listings, television advertisements, internet advertisements, social media or social network sites and radio advertisements. "Advertisement promoting the services of a pregnancy services center" does not include communications or statements made by a center in the course of its operations that do not promote the center's services to clients or the general public, and that are directed exclusively to the center's non-client directors, employees, past financial donors, and interns.

(b) Every advertisement promoting the services of a pregnancy services center must include in English and Spanish the statement: "This facility does not have a licensed medical provider on site to provide or supervise all services." The lettering of such statements in printed materials must be clear, legible, and in the same color and darkness, and in a type size at least one-third as high and one-third as broad, as the largest print in the advertisement. The lettering of such statement in television and internet advertisements must be clear and legible and in close proximi-

ty to the description of services provided at the pregnancy services center. The lettering of such statement on business cards may be printed on the back of the cards.

(c) Every pregnancy services center must also post the statement provided in Subsection (b) of this Section on its website and social media or social network sites. The lettering of such statement must be clear, legible, in the same color and darkness, and in a type size at least one-third as high and one-third as broad, as the largest print on the website or on the social media or social network site. The statement must be posted on every page of the website and social media or social network site. Where a page of the website or social media or social network site contains the description of services provided by such pregnancy services center, the statement must also be contained on that page, in close proximity to the services description.

(d) In addition to the disclosure requirements provided in subsection (c), the statement provided in subsection (b) must be included in the text of each post made on a social media or social network site. In the event a social media or social network site, such as Twitter, limits the number of characters that may be used in a post, the statement may be attached as a photo image to each post rather than included in the text of each post. Where the statement is included in a photo image, the lettering of such statement shall be consistent with the requirements described in subsection (c). Where a post contains the description of services provided by such pregnancy services center, the statement must also be in close proximity to the services description. Each post that does not comply

with this requirement shall constitute a single violation, except that for the purpose of imposing a sealing order pursuant to section 20-818(b)(1) of the administrative code, each day of noncompliance shall be treated as a separate occasion.

§ 5-270. Oral Disclosure.

Upon a client or prospective client request for an abortion, emergency contraception and/or prenatal care service, a pregnancy services center shall orally disclose in English and Spanish the statement: "This facility does not have a licensed medical provider on site to provide or supervise all services."

§ 5-271. Evidence.

(a) It shall be prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the factors listed in subparagraphs (a) through (f) of Title 20, Subchapter 17, Section 20-815(g)(2) of the New York City Administrative Code.

(b) A facility's distribution of a pregnancy test kit shall not, by itself, be sufficient to establish that it has the "appearance of a licensed medical facility," provided that the test is self-administered, self- diagnosed, and self-interpreted. Notwithstanding, a facility's distribution of a pregnancy test kit – even if the pregnancy test kit was exclusively self-administered, self-interpreted, and self-diagnosed – may be relied upon, in combination with another legally permissible factor, to establish the "appearance of a licensed medical facility."

OAKLAND ORDINANCE

16 JUN 24 AM 9:05

APPROVED AS TO FORM AND LEGAILTY
/s/ Barbara J. Parker
City Attorney's Office

OAKLAND CITY COUNCIL

ORDINANCE NO. 13378 C.M.S.

INTRODUCED BY VICE MAYOR ANNIE CAMPBELL WASHINGTON, OAKLAND CITY ATTORNEY BARBARA J. PARKER, COUNCIL MEMBER ABEL GUILLEN, AND COUNCIL MEMBER REBECCA KAPLAN

ADOPT AN ORDINANCE AMENDING SECTION 5.06 OF THE OAKLAND MUNICIPAL CODE TO PROHIT LIMITED SERVICES PREGNANCY CENTERS FROM MAKING FALSE OR MISLEADING STATEMENTS TO THE PUBLIC ABOUT PREGNANCY-RELATED SERVICES THE CENTERS OFFER OR PERFORM.

WHEREAS, a woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government; and

WHEREAS, when a woman considers termination of a pregnancy, time is a critical factor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available; and

WHEREAS, many people have deeply held reli-

gious and moral beliefs both supporting and opposing abortion, and the City respects the right of individuals to express and promote such beliefs; and

WHEREAS, in recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as crisis pregnancy centers or limited services pregnancy centers. Although some of these centers (referred to herein as "LSPCs") are licensed to provide various medical services to pregnant women, most LSPCs are not licensed medical clinics; and

WHEREAS, some LSPCs openly acknowledge, in their advertising and their facilities, that they do not provide abortions or access to emergency contraception or refer clients to other providers of such services. Some of these same LSPCs also openly acknowledge that they believe abortion is morally wrong. Many LSPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling. This misleading of women seeking medical advice and/or care has the potential to be extremely harmful to women; and

WHEREAS, the City respects the right of LSPCs to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy; and

WHEREAS, the City has carefully balanced (1) the constitutionally protected right of a woman to choose to terminate her pregnancy, (2) the right of individuals to express their religious and ethical beliefs about abortion, (3) the serious harm to women

that can result from even slight delays due to false advertising for pregnancy and/or abortion services, and (4) the cost to local taxpayers that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services; and

WHEREAS, there are several circumstances prompting the need for LSPC regulation that is more protective of potential consumers of pregnancy center services; and

WHEREAS, LSPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion," so that persons searching for abortion services will see a link and advertisement for the LSPC at the top of the results page. In addition, many LSPCs advertise on billboards, mass-transit facilities, and through websites; and

WHEREAS, LSPCs often change their names, making it difficult for potential clients to do online research and find reviews of their services. Although the name of the LSPC organization may change, the entity does not, as evidenced by maintaining the same address and location, phone number, license number with the Department of Public Health and Federal Tax Identification number; and

WHEREAS, most clients do not come to LSPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a pregnancy commonly experience emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by LSPCs. These circumstances raise the need for

regulation that is more protective of potential consumers of pregnancy center services; and

WHEREAS, due to the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or access to emergency contraception is of special concern to the City. When a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all; and

WHEREAS, the State of California recently recognized this problem and passed the Reproductive FACT Act, and in turn, LSPC proponents have filed suit for their right to withhold information from clients. In addition, there are several cities within California and many states across the Country seeking to address this issue; and

WHEREAS, local tax dollars provide the financial support for local medical providers of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies; and

WHEREAS, if women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of LSPCs, the cost of providing more invasive and expensive options may fall upon health facilities funded by local taxpayers, which provide the medical services of last resort for the City's indigent population; now, therefore be it

RESOLVED: that the City of Oakland has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SEC 5.06.110. TITLE

This new Section 5.06.110 of Oakland Municipal Code Chapter 5.06, entitled Advertising Matter, shall be known as the "Pregnancy Information Disclosure and Protection Ordinance."

SECTION 1. Findings. The City Council finds and determines the foregoing findings to be true and correct and hereby makes them a part of this ordinance.

1. A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

2. When a woman considers termination of a pregnancy, time is a critical factor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available.

3. Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and the City respects the right of individuals to express and promote such beliefs.

4. In recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as

crisis pregnancy centers or limited services pregnancy centers. Although some of these centers (referred to herein as "LSPCs") are licensed to provide various medical services to pregnant women, most LSPCs are not licensed medical clinics.

5. Some LSPCs openly acknowledge, in their advertising and their facilities, that they do not provide abortions or access to emergency contraception or refer clients to other providers of such services. Some of these same LSPCs also openly acknowledge that they believe abortion is morally wrong. Many LSPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling. This misleading of women seeking medical advice and/or care has the potential to be extremely harmful to women.

6. The City respects the right of LSPCs to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy.

7. The City has carefully balanced (1) the constitutionally protected right of a woman to choose to terminate her pregnancy, (2) the right of individuals to express their religious and ethical beliefs about abortion, (3) the serious harm to women that can result from even slight delays due to false advertising for pregnancy and/or abortion services, and (4) the cost to local taxpayers that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

8. There are several circumstances prompting the

need for LSPC regulation that is more protective of potential consumers of pregnancy center services.

9. LSPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion," so that persons searching for abortion services will see a link and advertisement for the LSPC at the top of the results page. In addition, many LSPCs advertise on billboards, mass-transit facilities, and through websites.

10. LSPCs often change their names, making it difficult for potential clients to do online research and find reviews of their services. Although the name of the LSPC organization may change, the entity does not, as evidenced by maintaining the same address and location, phone number, license number with the Department of Public Health and Federal Tax Identification number.

11. Most clients do not come to LSPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a pregnancy commonly experience emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by LSPCs. These circumstances raise the need for regulation that is more protective of potential consumers of pregnancy center services.

12. Due to the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or access to emergency contraception is of special concern to the City. When a woman is misled into believing that a clinic offers services that it does not in fact offer,

she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all.

13. The State of California recently recognized this problem and passed the Reproductive FACT Act, and in turn, LSPC proponents have filed suit for their right to withhold information from clients. In addition, there are several cities within California and many states across the Country seeking to address this issue.

14. Local tax dollars provide the financial support for local medical providers of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies.

15. If women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of LSPCs, the cost of providing more invasive and expensive options may fall upon health facilities funded by local taxpayers, which provide the medical services of last resort for the City's indigent population.

16. The City of Oakland has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

SECTION 2. Definitions. For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live

birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient, within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates to health insurance and/or the past, present or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provisions of federal, state, or local law to provide medical services.

(f) "Limited services pregnancy center" shall mean a pregnancy services center, as defined in subsection (g) below, that does not directly provide or provide referrals to clients for abortions and/or does not directly provide or provide referrals to clients for emergency contraception.

(g) "Pregnancy services center" shall mean a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide ser-

vices to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(A) The facility offers pregnancy testing and/or pregnancy diagnosis;

(B) The facility has staff or volunteers who wear medical attire or uniforms;

(C) The facility contains one or more examination tables;

(D) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(E) The facility has staff or volunteers who collect health information from clients; or

(F) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or more of the characteristics listed above.

(h) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(i) "Prenatal care" shall mean services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy. Clinical laboratory services refers to the microbiological, serological, chemical, hematological,

biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis,

SECTION 3. Violation.

(a) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, in any newspaper or other publication, or any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, whether by statement or omission, that the limited services pregnancy center knows or which by the exercise of reasonable care should know to be untrue or misleading.

(b) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (3)(a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

SECTION 4. Enforcement.

(a) The City Attorney may enforce the provisions of this Chapter through a civil action in any court of competent jurisdiction. Before filing an action under

this Chapter, the City Attorney shall give written notice of the violation to the limited services pregnancy center. The written notice shall indicate that the limited services pregnancy center has ten (10) days in which to cure the false, misleading, or deceptive advertising. If the limited services pregnancy center has not responded to the written notice within ten (10) days, or refuses to cure the false, misleading, or deceptive advertising within that period, the City Attorney may file a civil action.

(b) The City Attorney may apply to any court of competent jurisdiction for injunctive relief compelling compliance with any provision of this Chapter and correcting the effects of the false, misleading, or deceptive advertising. Such an injunction may require a limited services pregnancy center to:

(1) Pay for and disseminate appropriate corrective advertising in the same forum as the false, misleading, or deceptive advertising.

(2) Post a notice on its premises, in a location clearly noticeable from the waiting area, examination area, or both, stating:

(A) Whether there is a licensed medical doctor, registered nurse, or other licensed medical practitioner on staff at the center; and

(B) Whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center.

(3) Be placed on a Violator's List with other Limited Services Pregnancy Centers in violation of this same Section.

(4) Such other narrowly tailored relief as the

court deems necessary to remedy the adverse effects of the false, misleading, or deceptive advertising on women seeking pregnancy-related services.

(c) Upon a finding by a court of competent jurisdiction that a limited services pregnancy center has violated Section 93.4 of this Chapter, the City shall be entitled to recover civil penalties from each and every party responsible for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

(d) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(e) Nothing in this Chapter shall be interpreted as creating a right of action for any party other than the City.

(f) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

SECTION 5. General Provisions.

(a) **Severability.** If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining por-

tions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

(b) **No Conflict with State or Federal Law.** Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) **Undertaking for the General Welfare.** In adopting and implementing this ordinance, the City of Oakland is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

SECTION 6. Effective Date. This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

Introduction Date JUL 05 2016

1922012v1

IN COUNCIL, OAKLAND, CALIFORNIA, July 19, 2016

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GUILLEN, KALB, KAPLAN, REID AND PRESIDENT GIBSON MCELHANEY—8

NOES—0

ABSENT—0

ABSTENTION—0

ATTEST:
/s/ LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

Date of Attestation: July 26, 2016

SAN FRANCISCO ORDINANCE

FILE NO 110899 ORDINANCE NO 212-11

[Administrative Code – False Advertising by Limited Services Pregnancy Centers]

Ordinance amending the San Francisco Administrative Code by adding Chapter 93, Sections 93.1 through 93.5, to prohibit limited services pregnancy centers from making false or misleading statements to the public about pregnancy-related services the centers offer or perform.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The San Francisco Administrative Code is hereby amended by adding Chapter 93, Sections 93.1 through 93.5, to read as follows:

SEC. 93.1. TITLE. The Chapter shall be known as the Pregnancy Information Disclosure and Protection Ordinance.

SEC. 93.2. FINDINGS.

1. San Francisco serves as the medical provider of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies.

2. A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

3. Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and

the City respects the right of individuals to express and promote such beliefs.

4. When a woman considers termination of a pregnancy, time is a critical f actor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available.

5. In recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as crisis pregnancy centers ("CPCs"). Although some CPCs are licensed to provide various medical services to pregnant women, most CPCs are not licensed medical clinics.

6. Some CPCs openly acknowledge in their advertising and their facilities, that they do not provide abortions or emergency contraception or refer clients to other providers of such services. Some of these same CPCs also openly acknowledge that they believe abortion is morally wrong. Many CPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling.

7. CPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion," so that persons searching for abortion services will see a link and advertisement for the CPC at the top of the results page. In addition, many CPCs advertise on billboards, mass-transit facilities, and through websites.

8. Most clients do not come to CPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a preg-

nancy commonly are experiencing emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by CPCs. These circumstances raise the need for regulation that is more protective of potential consumers of pregnancy center services.

9. Because of the time-sensitive and constitutionally protected nature of (the decision to terminate a pregnancy. false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City, When a woman is misled into believing that a clinic offers services that it does not in fact offer. she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all.

10. The City respects the right of limited services pregnancy centers to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy.

11. However, if women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of CPCs, the cost of providing more invasive and expensive options may fall upon City health facilities, which provide the medical services of last resort for the City's indigent population.

12. After carefully balancing the constitutionally protected right of a woman to choose to terminate her pregnancy, the right of individuals to express their religious and ethical beliefs about abortion. the harm to women worked by even slight delays that can be

caused by false advertising for pregnancy and/or abortion services, and the cost to the City that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

SEC. 93.3. DEFINITIONS.

For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient. Within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates to health insurance and/or the past, present or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provi-

sions of federal, state, or local law to provide medical services.

(f) "Limited services pregnancy center" shall mean a pregnancy services center, as defined in subsection (g), that does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception.

(g) "Pregnancy services center" shall mean a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(A) The facility offers pregnancy testing and/or pregnancy diagnosis;

(B) The facility has staff or volunteers who wear medical attire or uniforms;

(C) The facility contains one or more examination tables;

(D) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(E) The facility has staff or volunteers who collect health information from clients; or

(F) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or more of the characteristics listed above.

(h) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(i) "Prenatal care" shall mean services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy. Clinical laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

SEC. 93.4. VIOLATION.

(a) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, in any newspaper or other publication, or any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof which is untrue or misleading, whether by statement or omission, that the limited services pregnancy center knows or which by the exercise of reasonable care should know to be untrue or misleading.

(b) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

SEC. 93.5. ENFORCEMENT.

(a) The City Attorney may enforce the provisions of this Chapter through a civil action in any court of competent jurisdiction. Before filing an action under this Chapter, the City Attorney shall give written notice of the violation to the limited services pregnancy center. The written notice shall indicate that the limited services pregnancy center has ten (10) days in which to cure the false, misleading, or deceptive advertising. If the limited services pregnancy center has not responded to the written notice within ten (10) days, or refuses to cure the false, misleading, or deceptive advertising within that period, the City Attorney may file a civil action.

(b) The City Attorney may apply to any court of competent jurisdiction tor injunctive relief compelling compliance with any provision of this Chapter and correcting the effects of the false, misleading, or deceptive advertising. Such an injunction may require a limited services pregnancy center to:

(1) Pay for and disseminate appropriate corrective advertising in the same for as the false, misleading, or deceptive advertising.

(2) Post a notice on its premises, in a location clearly noticeable from the waiting area, examination area, or both, stating:

(A) Whether there is a licensed medical doctor, registered nurse, or other licensed medical practitioner on staff at the center: and

(B) Whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center.

(3) Such other narrowly tailored relief as the court deems necessary to remedy the adverse effects of the false, misleading, or deceptive advertising on women seeking pregnancy-related-services.

(c) Upon a finding by a court of competent jurisdiction that a limited services pregnancy center has violated Section 93.4 of this Chapter. the City shall be entitled to recover civil penalties from each and every party responsible for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

[(d) omitted in original]

(e) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(f) Nothing in this Chapter shall be interpreted as creating a right of action for any party other than the City.

(g) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

Section 2. General Provisions.

(a) **Severability.** If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid or unconstitutional.

(b) **No Conflict with State or Federal Law.** Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) **Undertaking for the General Welfare.** In adopting and implementing this ordinance, the City and County of San Francisco is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

Section 3. Effective Date. This ordinance shall become effective 30 days from the date of passage.

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: /s/Erin Bernstein
Deputy City Attorney

BOARD OF SUPERVISORS
7/29/2011